

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 96

YVETTE M. WRIGHT, ET AL., APPELLANTS,

vs.

NELSON A. ROCKEFELLER, GOVERNOR OF
NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol. A]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

62 Civil Action 2601

**YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLOR-
NEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all indi-
vidually and on behalf of all other persons similarly
situated, Plaintiffs,**

—against—

**NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, CAROLINE K. SIMON, Secretary of
State of the State of New York, and DENIS J. MAHON,
JAMES M. POWER, JOHN R. CRLWS and THOMAS MALLER,
Commissioners of Elections constituting the Board of
Elections of the City of New York, Defendants.**

COMPLAINT—Filed July 26, 1962

Jurisdiction

1. Jurisdiction is founded on the existence of a Federal question and on the existence of a question arising under particular statutes. The action arises under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and under the Civil Rights Act, Title 42, United States Code, sections 1983, 1988; Title 28 United States Code, section 1343; and, also, under Title 28, United States Code, sections 2201, 2202 and 2281.

2. This is an action to redress the deprivation, under color of the law of the State of New York, of rights, privileges and immunities secured to the plaintiffs under the Constitution and laws of the United States and to declare unconstitutional that portion of the State statute in question which deprives the plaintiffs of their rights, privileges and immunities.

[fol. B]

The Plaintiffs

3. The plaintiffs, Yvette M. Wright and Horacio L. Quinones, are United States citizens, residents and registered voters of the 20th Congressional District in the State, City and County of New York; the plaintiffs, Darwin Bolden and Benny Cartagena, are United States citizens, residents and registered voters of the 19th Congressional District in the State, City and County of New York; the plaintiffs, Ramon Diaz, Joseph R. Erazo and Blorneva Selby, are United States citizens, residents and registered voters of the 18th Congressional District in the State, City and County of New York; the plaintiffs, Walsh McDermott and Seth Dubin, are United States citizens, residents and registered voters of the 17th Congressional District of the State, City and County of New York. Each of the plaintiffs brings this action on his or her own behalf and on behalf of all other residents and registered voters in the four Congressional Districts concerned. The class of residents and registered voters of these four Congressional Districts is so large as to make it impracticable to bring them before this Court. The named plaintiffs, however, fairly and adequately represent this class and, since common questions of law and fact as well as common relief is sought, they request the Court to consider this a class suit.

The Defendants.

4. The defendants are United States citizens and officials of the State of New York, residing in the State of New York. Defendant Nelson A. Rockefeller is Governor of the State of New York and is under a duty to administer and enforce the State statute which is the subject of complaint herein. Defendant Louis J. Lefkowitz is the Attorney General of the State of New York and is also under a duty to administer and enforce the statute complained of herein. [fol. C] Defendant Caroline K. Simon is under a similar duty to administer and enforce the complained of statute in her capacity as Secretary of State of the State of New York, as are defendants Denis J. Mahon, James M. Power, John R. Crews and Thomas Mallee, the Commissioners of the Board of Elections of the City of New York.

The New York State Statute Complained of

5. This complaint is directed against that distinct and separate portion of Chapter 980 of the 1961 Laws of New York State, which describes the boundaries of the four congressional districts apportioned to the County of New York, known as the 17th, 18th, 19th and 20th Congressional Districts of New York. The purpose of the statute, enacted into law on November 10, 1961, was to repeal the then existing division of the State into congressional districts based on the 1950 decennial census. Section 110 of the statute provides that the new apportionment is to be effective for the purpose of the primary and general election of representatives in Congress who are to take office after January 1, 1963. The primary election and the related general election are to take place September 6, 1962 and November 6, 1962, respectively.

6. Section 111 of Chapter 980 of the 1961 Laws of the State of New York sets forth the bounds of each of the newly-formed Congressional Districts. The 17th, 18th, 19th and 20th Congressional Districts are wholly contained within and comprise all of the districts within the County of New York, and their redistricting represents a distinct and separable portion of the provisions of Chapter 980. These districts, shown on the map submitted as Exhibit 1 to this complaint, are described in Chapter 980 as follows:

"Seventeenth. The Seventeenth Congressional District shall consist of that part of New York County described as follows: Beginning at a point where East Fourteenth Street extended intersects the waters of the [fol. D] East River, thence Westerly along East Fourteenth Street extended and East Fourteenth Street to First Avenue, to East Nineteenth Street, to Third Avenue, through Cooper's Square, to the Bowery, to Great Jones Street (West Third Street), to The Avenue of the Americas (Sixth Avenue), to West Fourth Street, to Christopher Street, to Bleecker Street, to Abington Square, thence Northerly along Eighth Avenue, to West Fourteenth Street, to Seventh Avenue, to West Thirty Fourth Street, to Eighth Avenue, to West

4

Fifty Fourth Street, to Ninth Avenue, thence Northerly along Ninth Avenue and Columbus Avenue, to West Seventy Third Street, to Central Park West, to the intersection of Cathedral Parkway, Central Park West and West One Hundred Tenth Street, thence Easterly along West One Hundred Tenth Street to Fifth Avenue, thence Southerly along Fifth Avenue to East Ninety Eighth Street, to Madison Avenue, to East Ninety Seventh Street, to Park Avenue, to East Ninety Sixth Street, to Lexington Avenue, to East Ninety First Street, to Third Avenue, to East Eighty Ninth Street, to East End Avenue, thence Northerly along East End Avenue and East End Avenue extended to the waters of the East River, thence through the waters of the East River and the East River Channel to the place of beginning including Welfare Island.
(Population 1960 Federal Census- 382,320)

"Eighteenth. The Eighteenth Congressional District shall consist of that part of New York County described as follows: Beginning at a point where West One Hundred Sixty Fifth Street extended Easterly intersects the waters of the Harlem River, thence Westerly along West One Hundred Sixty Fifth Street extended and West One Hundred Sixty Fifth Street, to Edgecombe Avenue, to St. Nicholas Place, to West One Hundred Fiftieth Street, to Amsterdam Avenue, thence Southerly along Amsterdam Avenue to West One Hundred Twenty Second Street, to Morningside Drive, to Cathedral Parkway, thence Easterly along Cathedral Parkway and West One Hundred Tenth Street to Fifth Avenue, thence Southerly along Fifth Avenue to East Ninety Eighth Street, to Madison Avenue, to East Ninety Seventh Street, to Park Avenue, to East Ninety Sixth Street, to Lexington Avenue, to East Ninety First Street, to Third Avenue, to East Eighty Ninth Street, to East End Avenue, thence Northerly along East End Avenue and East End Avenue extended to the waters of the Harlem River and through the waters of the Harlem River, Hell Gate,

East River, Harlem River, to the place of beginning, including Randalls Island, Ward's Island and Mill Rock.

(Population 1960 Federal Census 431,330)

"Nineteenth. The Nineteenth Congressional District shall consist of that part of New York County described as follows: Beginning at a point where East Fourteenth Street extended intersects the waters of the East River, thence Westerly along East Fourteenth Street extended and East Fourteenth Street, to First [fol. E] Avenue, to East Nineteenth Street, to Third Avenue, through Cooper's Square to the Bowery, to Great Jones Street (West Third Street), to The Avenue of the Americas (Sixth Avenue), to West Fourth Street, to Christopher Street, to Bleecker Street, to Abbington Square, thence Northerly along Eighth Avenue, to West Fourteenth Street, to Seventh Avenue, to West Thirty Fourth Street, to Eighth Avenue, to West Fifty Fourth Street, to Ninth Avenue, thence Northerly along Ninth Avenue and Columbus Avenue, to West Seventy Third Street, to Central Park West, to West Eighty Sixth Street, thence Westerly along West Eighty Sixth Street and West Eighty Sixth Street extended to the waters of the Hudson River, thence Southerly through the waters of the Hudson River, New York Bay, Buttermilk Channel, the East River to the place of beginning, including Governor's Island, Bedlee's Island and Ellis Island.

(Population 1960 Federal Census 445,175)

"Twentieth. The Twentieth Congressional District shall consist of that part of New York County beginning at a point where West One Hundred Sixty Fifth Street extended Easterly intersects the waters of the Harlem River, thence Westerly along West One Hundred Sixty Fifth Street extended and West One Hundred Sixty Fifth Street to Edgecombe Avenue, to St. Nicholas Place, to West One Hundred Fiftieth Street, to Amsterdam Avenue, thence Southerly along Amsterdam Avenue to West One Hundred Twenty Second Street, to Morningside Drive, to Cathedral Parkway, to Cen-

tral Park West, to West Eighty Sixth Street, thence along West Eighty Sixth Street extended to the waters of the Hudson River, thence Northerly through the waters of the Hudson River, Harlem River, to the dividing line between the County of Bronx and the County of New York, thence Northerly, Easterly and Southerly along said dividing line to the waters of the Harlem River, thence Southerly through the waters of the Harlem River to the place of beginning.
(Population 1960 Federal Census 439,456)"

[fol.F]

The Unconstitutionality Complained of

7. That portion of Chapter 980 which creates the boundaries of the 17th, 18th, 19th and 20th Congressional Districts of the State of New York deprives plaintiffs of rights, privileges and immunities guaranteed by the "due process clause" of the Fourteenth Amendment to the Constitution of the United States, by the "equal protection clause" of the Fourteenth Amendment to the Constitution of the United States and by the Fifteenth Amendment to the Constitution of the United States and the Civil Rights Act. That portion of Chapter 980 establishes irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin. It is contrived to create one district, the 17th Congressional District, which excludes non-white citizens and citizens of Puerto Rican origin and which is over-represented in comparison to the other three districts in the County of New York. The 18th, 19th and 20th Congressional Districts have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York and to be under-represented in relation to the 17th Congressional District.

8. The unconstitutional districting herein complained of has existed for many years. There have been repeated and energetic efforts to seek legislative correction of the abridgement of plaintiffs' constitutional rights, privileges and immunities. These efforts have been to no avail in part

because of the existing unconstitutional apportionment of the Legislature of the State of New York. Instead of remedying the abridgement of plaintiffs' constitutional rights, privileges and immunities, the New York State Legislature, in enacting successive statutes establishing Congressional Districts in the County of New York, has [fol. G] redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perpetuate and aggravate the irrational, discriminatory and unequal districts and the segregation of voters by race and place of origin in the County of New York. Thus, in the latest redistricting, the Legislature, in its effort to maintain the white, non-Puerto Rican character of the 17th Congressional District, constituted it with a population 12% less than that of the 18th Congressional District, 15.4% less than that of the 19th Congressional District, and 14% less than that of the 20th Congressional District.

Relief Requested

Wherefore, plaintiffs respectfully urge:

- (1) That a three-judge constitutional court be empanelled to hear and determine this case;
- (2) That a decree issue declaring that separate and distinct portion of Chapter 980 of the 1961 Laws of New York State which describes the boundaries of the 17th, 18th, 19th and 20th Congressional Districts to be unconstitutional as violative of the 14th and 15th Amendments to the Constitution of the United States, as well as the Civil Rights Act;
- (3) That a preliminary injunction be entered, pending the final disposition of this case, restraining and enjoining the defendants, their servants, agents and successors in office, from conducting the primary and general elections scheduled for September 6, 1962 and November 6, 1962 respectively in New York County, on the basis of the district boundaries for the 17th, 18th, 19th and 20th Congressional Districts, as described in Chapter 980, and from otherwise enforcing or executing that portion of Chapter 980;

[fol. H] (4) That a permanent injunction be entered, restraining and enjoining the defendants, their servants, agents and successors in office, from conducting the primary and general elections scheduled for September 6, 1962 and November 6, 1962 respectively, in New York County, on the basis of the district boundaries for the 17th, 18th, 19th and 20th Congressional Districts, as described in Chapter 980, and from otherwise enforcing or executing that portion of Chapter 980;

(5) That the court decree that, unless there is enacted into law within a reasonable time prior to September 6, 1962, a valid redistricting of the 17th, 18th, 19th and 20th Congressional Districts, the primary and general elections in those districts shall be held at large in the County of New York to which the four seats have been apportioned; or, in the alternative,

(6) That the court decree that, unless there is enacted into law within a reasonable time prior to September 6, 1962, a valid redistricting of the 17th, 18th, 19th and 20th Congressional Districts, a special master be appointed to redefine constitutionally the boundaries of those districts; and

(7) That the court grant such other and further relief as to this Court may seem just, fitting and proper.

Respectfully submitted,

Justin N. Feldman, 415 Madison Avenue, New York City;

Jerome T. Orans, 574 Fifth Avenue, New York City;

Leo M. Drachsler, 770 Lexington Ave., New York City;

Edward J. Bloustein, 135 East 44th St., New York City;

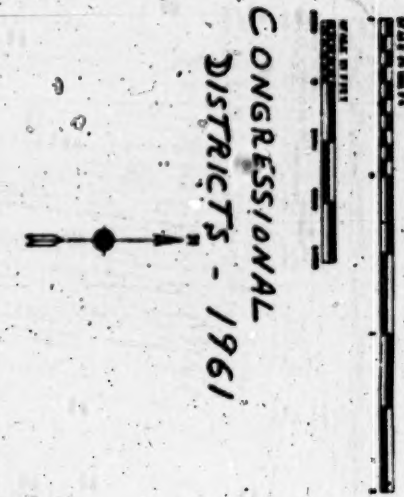
Bruce McM. Wright, 120 East 56th St., New York City,

Attorneys for Plaintiffs.

Dated: July 26, 1962.

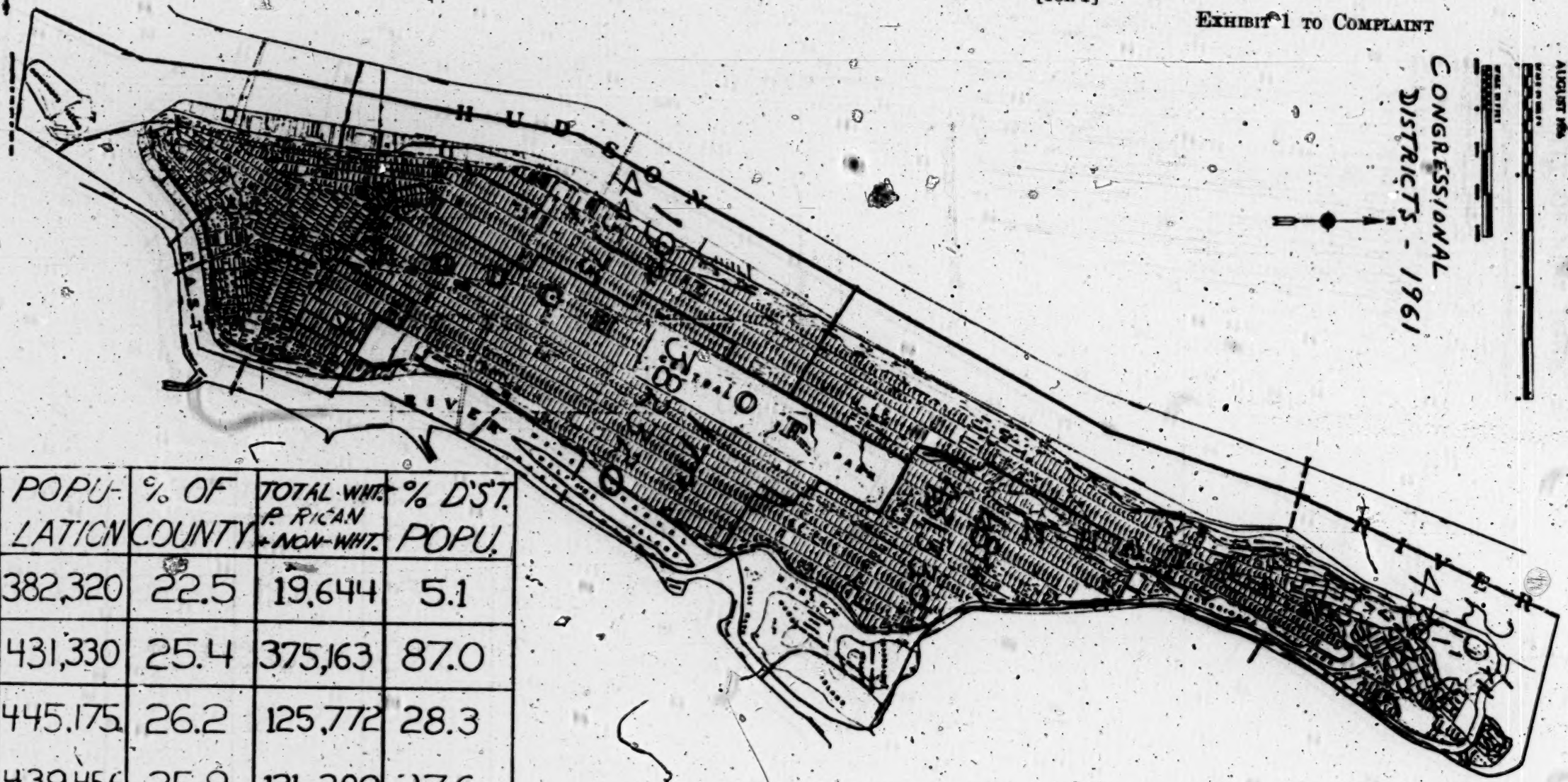
BOROUGH OF MANHATTAN
 DEPARTMENT OF CITY PLANNING
 THE CITY OF NEW YORK
 AUGUST 1966

CONGRESSIONAL
 DISTRICTS - 1961



[fol. I]

EXHIBIT 1 TO COMPLAINT



| CITY DST. | POPULATION | % OF COUNTY | TOTAL WHT. P. R. CAN + NON-WHT. | % D'ST. POPUL. |
|--------------|------------|----------------|---------------------------------------|-------------------|
| 17 | 382,320 | 22.5 | 19,644 | 5.1 |
| 18 | 431,330 | 25.4 | 375,163 | 87.0 |
| 19 | 445,175 | 26.2 | 125,772 | 28.3 |
| 20 | 439,456 | 25.9 | 121,289 | 27.6 |

[fol. J]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION TO DISMISS COMPLAINT PURSUANT TO
F.R.C.P. RULE 12(b) AND DENIAL THEREOF—August 3, 1962

SIRS:

Please Take Notice, that upon the summons dated the 26th day of July, 1962 and the complaint herein, the undersigned will move this Court at a term for motions to be held at the United States District Court for the Southern District of New York, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 3rd day of August, 1962 at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, to dismiss the complaint as against the defendants, Nelson A. Rockefeller, Governor of the State of New York, Louis J. Lefkowitz, Attorney General of the State of New York, and [fol. K] Caroline K. Simon, Secretary of State of the State of New York, upon the ground that the complaint does not present a substantial federal question in that (1) the Court lacks jurisdiction over the subject matter; and (2) the complaint fails to state a claim upon which relief can be granted; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York, August 2, 1962.

Yours, etc.,

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney pro se and for Nelson A. Rockefeller, Governor of the State of New York and Caroline K. Simon, Secretary of State of the State of New York.

To: Justin N. Feldman, Esq., 415 Madison Avenue, New York, New York, Attorney for Plaintiffs.

[fol. L]

DENIAL OF MOTION—August 3rd, 1962**Motion denied following argument. So ordered.****Wilfred Feinberg, USDJ**

[fol. M]

[File endorsement omitted]**IN THE UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[Title omitted]****DESIGNATION OF JUDGES—August 6, 1962**

Having been notified by the Honorable Wilfred Feinberg, United States District Judge for the Southern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281 for an order enjoining the enforcement of a portion of Chapter 980 of the 1961 Laws of the State of New York, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable Wilfred Feinberg, to hear and determine said cause as provided by law: Honorable Leonard P. Moore, United States Circuit Judge and Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., August 6, 1962.

[fol. N]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER SETTING CASE FOR HEARING—August 7, 1962

It appearing that, by order dated August 3, 1962, District Judge Wilfred Feinberg ordered that this matter be determined by three judges in accordance with the provision of 28 U.S.C. § 2284 and,

It further appearing that, by order dated August 6, 1962, Chief Judge Lumbard of this Circuit ordered that this court consist of the Honorable Leonard P. Moore, Circuit Judge, and the Honorable Thomas F. Murphy and the Honorable Wilfred Feinberg, District Judges,

[fol. O] It is hereby ordered that hearing of this matter before the aforesaid three-judge district court be held at 11:30 a.m. on August 9, 1962, in Room 518, United States Court House, Foley Square, New York, N. Y.

Dated: New York, N. Y., August 7, 1962.

Wilfred Feinberg, U. S. D. J.

[fol. P]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF HEARING—August 7, 1962

Sir:

Pursuant to the provisions of Title 28, United States Code, Section 2284, you are hereby notified that by an order dated August 7, 1962, made by the Honorable Wilfred Fein-

berg, a hearing has been set by a three-judge court composed of the Hon. Leonard P. Moore, Circuit Judge, the Hon. Thomas F. Murphy and the Hon. Wilfred Feinberg, District Judges, for the 9th day of August 1962, in Room 518 at 11:30 A.M. at the United States Courthouse, Foley Square, New York City, N. Y.

Dated: New York, N. Y. August 7, 1962.

Herbert A. Charlson, Clerk of the Court.

To:

Hon. Nelson A. Rockefeller, Governor of the State of New York, Albany, New York.

Board of Elections, Corporation Counsel, Municipal Bldg., New York, N. Y.

Hon. Louis J. Lefkowitz, Attorney General of the State of N. Y., 80 Centre St., New York 13, N. Y.

Justin N. Feldman, 415 Madison Ave., New York, N. Y.

[fol. P-1] Certified mail receipts (omitted in printing).

[fol. Q] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

YVETTE M. WRIGHT, et al., individually and on behalf of
all others similarly situated, Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the State of
New York, et al., Defendants,

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL, ANTONION
MENDEZ, Applicants for Intervention.

**MOTION OF ADAM CLAYTON POWELL, ET AL., TO INTERVENE
AS DEFENDANTS—Filed August 10, 1962**

Adam Clayton Powell, J. Raymond Jones, Lloyd E. Dickens, Mark Southall, Antonion Mendez and Hulan E. Jack move for leave to intervene as defendants in this action pursuant to Rule 24 (b) (2) of the Federal rules of procedure in order to assert the defense set forth in their proposed answer of which a copy is hereto attached on the grounds that:

1. The representation of the applicants' interest by the existing parties is or may be inadequate and the applicants are or may be bound by a judgment in this action.

Yours, etc.

Jawn A. Sandifer Esq., 271 W. 125th Street, New York, New York;

William C. Chance, Jr. Esq., 225 Broadway, New York, New York;

Robert W. Seavey Esq., Chrysler Building, 405 Lexington Avenue, New York, New York;

[fol. R] Morris Sterenbuch, 11 West 42nd Street, New York, New York.

Dated: New York, New York, August 10, 1962.

To:

Justin N. Feldman, 415 Madison Avenue, New York City;

Louis Lefkowitz, Attorney General for the State of New York.

[fol. 'S]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YVETTE M. WRIGHT, et al., individually and on behalf of
all others similarly situated, Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the State of
New York, et al., Defendants,

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHWALL, ANTONIO
MENDEZ, Applicants for Intervention.

INTERVENTION ANSWER

First Defense

Intervenors deny the allegations contained in paragraphs 1 and 2.

Second Defense

Intervenors deny any information sufficient to form a belief as to the allegations contained in that portion of paragraph 3 that alleges that the plaintiffs are residents and registered voters of the four Congressional Districts set forth and intervenors deny that the said plaintiffs bring this action in their behalf or that they represent the class to which the intervenors belong.

Third Defense

Intervenors deny any information sufficient to form a belief as to the allegations contained in paragraphs 4, 5 and 6.

Fourth Defense

Intervenors deny the allegations contained in paragraph 7.

[fol. T]

Fifth Defense

Interveners deny any information or belief as to the allegations contained in paragraph 8.

**For a First Affirmative
and Complete Defense**

That the court lacks jurisdiction in this case in that this is an action allegedly predicated upon the Civil Rights Act 42 USC Sections 1983 and 1988, 28 USC Section 1343 on the grounds that the plaintiffs have been excluded from the Seventeenth Congressional District because of race. The court may take judicial notice of the fact that the sole criteria and test for representation in Congress is based solely upon population rather than race. That the basis of this law suit as alleged in the complaint is that the redistricting plan by the Republican controlled Legislature was unfair because it excluded Negroes and Puerto Ricans from the Seventeenth Congressional District because of race and the said plan was directed against the Negroes and Puerto Ricans.

**As and for a Second Affirmative
and Complete Defense**

Defendants respectfully allege that the new lines established by the State Legislature at its Special Session was to draw new lines for the four Manhattan Congressional Districts effective September 6, 1962 the date of the primary along partisan political lines rather than racial lines. That the Republicans in the Seventeenth Congressional District cut out as many Democrats as they possibly could, not on the basis of race but rather on the basis of party affiliations.

[fol. U]

**As and for a Third Affirmative
and Complete Defense**

Defendants respectfully allege that the ultimate effect of a judgment of this court favorable to the plaintiffs would

be to deprive Negroes and Puerto Ricans of public offices they now hold in the Borough of Manhattan.

That more than 99% of all Negroes and Puerto Ricans holding office are elected from the Eighteenth Congressional District retained heavily its Negro and Puerto Rican character under the present redistricting.

That Negroes and Puerto Ricans now control at least one Congressional District which would in effect by an affirmative judgment in this law suit place in jeopardy their constitutional rights to representation in Congress.

If the relief requested with respect to wiping out District lines and thus requiring candidates to run on a county wide basis were granted the plaintiffs herein would in effect deprive Negroes and Puerto Ricans and other minorities of fair representation and equal protection under the law.

**As and for a Fourth Affirmative
and Complete Defense**

Defendants respectfully allege that this is not a proper class action. That the purported plaintiffs are nominal and do not in fact represent the class they purport to represent. That there is no community of interest between the people who will be most affected by a judgment of this court and the nominal plaintiffs in this law suit. That moreover the real party in interest in this law suit is the Democratic County Committee of the County of New York.

[fol. V]

**As and for a Fifth Affirmative
and Complete Defense**

The defendants respectfully allege that they are all duly elected members of the Democratic County Committee of New York and also members of the Executive Committee thereof. That the institution of this action by the Democratic County Committee of the County of New York was not legally authorized by the said County Committee or the Executive Committee thereof and the defendants herein never condoned or approved the same.

As and for a Sixth Affirmative
and Complete Defense

The plaintiffs are estopped from commencing and proceeding with this law suit for the reason that the interveners in their capacity as Democratic District leaders, members of the County Committee of the County of New York and of the Executive Committee thereof and as citizens entitled to vote in their congressional districts in the forthcoming primary and general elections have acted in reliance on the prima facie constitutionality of Chapter 980 of the 1961 Laws of New York State and upon failure of the real and nominal plaintiffs herein to commence any law suit attacking the purported unconstitutionality of the above cited law until on or after July 25, 1962 and particularly the said failure of these plaintiffs to commence any law suit on or before the 21st day of June 1962 which date was the day to commence the distribution of nominating petitions for public office in the County of New York.

During the period both prior to and subsequent to the said 21st day of June 1962 the interveners and their constituents have expended great amounts of labor, time and monies in promulgating the candidacy of various congressional candidates on a district wide basis as these districts are defined in the said Chapter 980 of the 1961 Laws of New York State these facts were well known to the real plaintiffs herein and their suit commenced on the said 25th day of July 1962 if successful must necessarily result in a county wide election of congressional candidates and would result in the deliberate and willful deprivation of the constitutional rights and property of the interveners herein.

Respectfully submitted,

Jawn A. Sandifer Esq., 271 W. 125th Street, New York, New York;

William C. Chance, Jr. Esq., 225 Broadway, New York, New York;

Robert W. Seavey Esq., Chrysler Building, 405 Lexington Avenue, New York, New York;

Morris Sterenbuch, 11 West 42nd Street, New York, New York.

[fol. X]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER—August 13, 1962

The defendants Nelson A. Rockefeller, Caroline K. Simon and Louis J. Lefkowitz answer the complaint as follows:

First Defense

This Court lacks jurisdiction over the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

[fol. Y]

Third Defense

Defendant Nelson A. Rockefeller, Governor of the State of New York, is not a proper party defendant to this action and the complaint fails to state a claim upon which relief can be granted against him. Plaintiffs can obtain complete relief, if otherwise entitled thereto, against some or all of the other parties to this action.

Fourth Defense

The 1962 congressional elections are so imminent that it would be impracticable and contrary to the best interests of the People of the State of New York to grant the relief requested by plaintiffs. Pursuant to the New York State Election Law, primary elections are to be held on September 6, 1962; designating petitions are now being circulated and must be filed between July 31 and August 7, 1962; and independent nominating petitions must be filed during the week beginning September 17, 1962.

Fifth Defense

1. Defendants deny the allegations of paragraphs 7 and 8 of the complaint; and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

[fol. Z] 2. Defendants deny the allegations of paragraphs 1 and 2 of the complaint, except that they admit that plaintiffs purport to base their complaint upon the Civil Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

3. Defendants admit the allegations of paragraph 4 of the complaint, except that they deny that defendant Nelson A. Rockefeller, as Governor of the State of New York, has any special statutory duty to enforce the laws of the State other than to discharge his responsibility under New York State Const. Art. 4, §3 to take care that the laws be faithfully executed.

4. Defendants admit the allegations of paragraphs 5 and 6 of the complaint, except that they deny that the redistricting of the 17th, 18th, 19th and 20th Congressional Districts represents a "distinct and separate" or "separable" portion of C.980 of the 1961 Laws of the State of New York.

Wherefore defendants demand judgment that the complaint herein be dismissed and that they have their costs and disbursements of this action.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney pro se and for Defendants Rockefeller and Simon, By Irving Galt, Assistant Solicitor General, Office & P.O. Address, 80 Centre Street, New York 13, N. Y.

New York, N. Y., August 13, 1962.

{fol. AA} [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ 2601

YVETTE M. WRIGHT, et al., Plaintiffs,

vs.

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al., Defendants.

Before: HON. WILFRED FEINBERG, District Judge.

DECISION GRANTING MOTION TO CONVENE A THREE-JUDGE
COURT AND DENYING MOTION TO DISMISS—August 3, 1962

[fol. BB]. The Court: Because I have given a great deal of thought to this question already in preparation for today's hearing, and because of the fact that there are considerations of time, I am going to decide the two motions before me right now.

Mr. Galt's argument was a very competent one. I feel, though, that a great deal of it goes to the merits, to be argued to the three-judge court.

The question before me is a very limited one. The Supreme Court has stated in the *Idlewild Bon Voyage* case:

"When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

I believe that those requirements are met here.

The nature of my ruling is a limited ruling. It is not [fol. CC] a ruling on the merits. That, of course, is obvious.

I am going to grant the motion for the convening of the three-judge court, and I will deny the motion to dismiss.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civ. 62-2601

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO,
BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all
individually and on behalf of all other persons similarly
situated, Plaintiffs,

vs.

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, CAROLINE K. SIMON, Secretary of
State of the State of New York, and DENIS J. MAHON,
JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE,
Commissioners of Elections constituting the Board of
Elections of the City of New York, Defendants.

Before: Hon. Leonard P. Moore, Circuit Judge, Hon.
Thomas F. Murphy, District Judge, and Hon. Wilfred Fein-
berg, District Judge, Sitting as a statutory court.

New York, August 9, 1962, 11:30 o'clock a.m.

Transcript of Proceedings

[fol. 2]

APPEARANCES:

Justin N. Feldman, Esq., Jerome T. Orans, Esq., Attorneys for Plaintiffs.

Irving Galt, Esq., Assistant Solicitor General, and Sheldon Raab, Esq., Deputy Assistant Attorney General, Attorneys for Governor, Secretary of State and Attorney General of the State of New York.

Leo A. Larkin, Esq., Corporation Counsel for the City of New York, Attorney for Defendants, Commissioners of the Board of Elections, New York City; Benjamin Offner, Esq., Assistant Corporation Counsel.

Also Present: Jawn A. Sandifer, Esq., William C. Chance, Jr., Esq., Robert W. Seavey, Esq., Morris Sterenbush, Esq.

The Clerk: Are the plaintiffs ready?

Mr. Feldman: Plaintiff is ready, sir.

The Clerk: Are the defendants ready?

Mr. Galt: The defendants, the Governor, Attorney General and Secretary of State are ready.

Mr. Offner: The defendants constituting the Board of Elections are ready, your Honors.

Judge Moore: Are all parties ready?

[fol. 3]

STATEMENT BY MR. SANDIFER ON BEHALF OF THE SIX CONGRESSMEN REQUESTING INTERVENTION, COLLOQUY AND COURT'S RULING THEREON

Mr. Sandifer: Your Honors, we have an application which we would like to make orally to the Court at this time.

Judge Moore: You are representing whom?

Mr. Sandifer: My name is Jawn A. Sandifer, and I am here representing the six district leaders that comprise the 12th Assembly District, the 13th Assembly District, the 11th, the 14th.

The individuals in person are Congressman Powell, Mark Southall, J. Raymond Jones, Lloyd Dickens, Hulan Jack and Antonio Mendez.

My clients feel that they have a vital interest in this proceeding. These individuals are duly elected representatives from the districts in which they reside. They are duly enrolled members of the Democratic Party. We feel that the interests of these individuals are so vital that they should be permitted to intervene in this proceeding.

If the Court should grant our application to intervene, we would then wish to actively participate in this proceeding. We feel that there are very serious issues jurisdictionally with respect to this proceeding.

In the first place, we do not feel that the persons who [fol. 4] presently constitute this cause of action as plaintiffs are the real parties in interest in this proceeding; that these people are nominal plaintiffs rather than the actual plaintiffs that should be involved, actual parties that should be involved in this proceeding.

Now, the real party that is bringing this proceeding, as far as my clients are concerned, is the Democratic County Committee, of which these clients that I have just mentioned are members. It is our position that the Democratic County Committee has never legally authorized this proceeding to be brought because of the fact that the individuals on whose behalf I speak were not duly notified and given an opportunity to make what we consider a major policy decision in this proceeding, and it is for these reasons, along with the fact that even though this proceeding is styled as a class action we, for one, do not feel that these petitioners who represent the class that I speak for today, and for these reasons we are asking the Court for permission to intervene, and if that motion is granted then we would ask the Court to adjourn this proceeding for at least one week so that we could prepare for trial and to participate in this proceeding.

[fol. 5] It is our position that neither party would be unduly prejudiced by an adjournment of this proceeding for at least one week so that we might be able to come in and to active participate. As a matter of fact, the only persons that could possibly be prejudiced by continuing

this proceeding at this point would be the very people whom I have spoken for, because the designating petitions of the Democratic candidates were filed on August 7th, and in view of the fact that those petitions have already been filed it would be these people that could possibly be prejudiced by any determination or judgment of this Court, and it is for these reasons that we would respectfully ask the Court for permission to intervene.

I realize, your Honors, that this application is being made orally, but if the Court should favorably consider this application and desires that papers be submitted in writing, we would be very happy to do so.

I might also apprise the Court of the fact that I conferred with the Attorney General yesterday regarding our application and we have discussed it with them, and I don't believe that there is any objection on the part of the Attorney General's office with respect to this application.

[fol. 6] Judge Moore: Mr. Sandifer, do your clients wish to intervene as plaintiffs or as defendants, or in some third category?

Mr. Sandifer: I would say, your Honor, that certainly we wouldn't want to intervene as plaintiffs.

The Court: I would assume you have to take some position and, if you are allowed to intervene, to file some formal papers stating your position.

Mr. Sandifer: We would, sir. And I might also say, your Honor, that I have here present Mr. Seavey, who represents J. Raymond Jones, individually. Mr. William C. Chance, an attorney who represents Lloyd Dickens, the district leaders of the Eleventh Assembly District and Mr. Morris Sterenbuch, who represents Mark Southall in the Twelfth Assembly District North.

Judge Moore: I don't think that we can postpone the hearing set for today. It probably will go over to another date, because we may very well not conclude today, so that if you are permitted to intervene you may have that opportunity, if my colleagues and I act favorably upon it.

Mr. Sandifer, you indicated that Mr. Galt doesn't oppose. Suppose we hear from Mr. Feldman and find out what his attitude might be.

[fol. 7] Mr. Feldman: May it please the Court, apart from reading a notice in this morning's newspaper, or a story in this morning's newspaper, at which apparently these persons represented by Mr. Sandifer at a press conference yesterday stated their intention to intervene, this is the first I know of it.

I gather they have conferred with the Attorney General yesterday, but no one conferred with me, either by telephone, mail, or any other fashion. I received no communication other than the New York Times this morning.

I don't know what status these persons would want in this proceeding. As your Honor indicated, they would have to be one of three kinds of persons, either plaintiffs, defendants, or amicus curiae of some sort. They don't want to be plaintiffs, they say. As defendants, I don't know what standing they have. I don't know that any relief that is prayed for in the complaint would be directed against them, any more than any other citizen of the State of New York.

As amicus curiae, I think they would have to make out a position for leave to intervene.

But I don't object so much to any intervention if there is a basis for it, and it is shown and set forth in the appropriate way. I do object to any concept of an adjournment.

These persons, with all due respect to Mr. Sandifer's statement that they didn't know of this proceeding, were informed by letter dated July 19, a week before this proceeding was brought, that the proceeding was contemplated, I personally can testify to that, because I drafted the letter that was sent to them. They were asked to consult with me if they had any views with respect to this action, and I heard from none of them.

Similarly, I drafted a telegram to one of these persons before the suit was filed with the clerk on July 26, again asking that he confer with me if he has any views with respect to this proposed action, and again I received no communication other than what I read in the Times this morning.

I gather Congressman Powell, who is one of the persons represented here, wishes to intervene. I might parenthet-

ically state I would be very interested if he were given leave to intervene as to whether he would also be prepared to come back from Europe and testify, since he left on the Queen Elizabeth, since I think that Congressman Powell may be privy to some communications and incidents [fol. 9] in connection with the enactment of Chapter 980, which I frankly would like to examine him about, if he wants to become a party to the proceeding.

Be that as it may, I must reserve on the question of intervention until I see more of what the nature of the intervention is to be, and as to the adjournment I would vigorously oppose any adjournment at this time.

Judge Moore: Mr. Sandifer, we have decided to permit you to intervene only to the extent, and possibly I don't use the word "intervene" legally correctly, but to participate in an amicus position and file any papers that you wish to file before this proceeding concludes to state the position that you wish to support on behalf of your clients.

If, however, while this case is pending, the kind of relief you think should be sought by an independent proceeding which is so related to this that you can make application to consolidate possibly that you will have to consider and take whatever steps the law and the facts permit you to take.

For the present time, you may consider yourself and your clients in the position of amicus curiae in the case. [fol. 10] We will not adjourn, we will go ahead with the hearing today, and you will be here, and we will probably have to have further hearings. We can't determine that at this time.

Mr. Sandifer: Of course, your Honor, I abide by the decision of the Court, but I would like to point out for your Honor that with respect to Congressman Powell's position—and I appear to press the position of the Congressman personally in this proceeding—and that is this: that you will note from these papers, from the petition or complaint that is filed here, that two of the plaintiffs allege that they are in the 18th Congressional District, which is Congressman Powell's district.

It is our position that any judgment of this court favorable to these plaintiffs would of necessity not only affect

Congressman Powell as a Congressman, but would also affect all the other congressional candidates that are running in the entire County of Manhattan, and it is for that reason it is our position that any judgment which would affect any one of the persons who is seeking to intervene here certainly would justify the right to intervene and to participate in a judgment that might in some way affect [fol. 11] the position that they hold public office themselves, and that is why I would ask the Court to seriously consider the issue that inasmuch as the 18th Congressional District would be affected by any judgment favorable to these plaintiffs, that you would therefore consider the rights of the individual who may be affected as a result of that judgment.

Judge Moore: Possibly you could assist us in our ultimate decision by outlining very briefly the nature and extent of the intervention, the type of proof, if any, or whether you merely wish to restrict yourself to argument, written or oral. If you tell us something of what you have in mind, and what you would do if you were allowed to intervene, it would materially assist us in coming to our conclusion.

Mr. Sandifer: Let me just say this, Judge: I understand from having conferred with the District Attorney—I mean with the Attorney General yesterday, Mr. Galt, that there was a pretrial on this particular case that resulted in the arrangement today that testimony would begin with respect to plaintiffs' cause of action, and that there would be an adjournment from this proceeding until next Wednesday. I am not certain whether that is accurate or not.

Judge Moore: That is correct. We told Mr. Galt, re-[fol. 12] resenting the Governor and the Attorney General, that he would have until Wednesday in the light of whatever happened today to prepare to cross-examine or to introduce other material.

Mr. Sandifer: In view of that pretrial arrangement, what we would like to have the opportunity of doing, among other things, would be that as a result of any testimony that might go in today, in this proceeding, that we would be given an opportunity if the circumstances warranted it, to put in possibly rebuttal testimony, or put in witnesses next Wednesday, if possible.

We would like this Court to give us an opportunity to go beyond the simple amicus curiae brief in this case, because it may be there may be other facts and information we would want to develop in the course of the testimony of the trial.

Judge Moore: Mr. Sandifer, if you will wait just a minute, in the light of what you just said, the Court will take a five minute recess and discuss the matter.

Mr. Feldman: May I be heard briefly before you do, sir?

Judge Moore: Certainly.

Mr. Feldman: I merely want to point out that Chapter [fol. 13] 980, drawing the lines of the four Congressional Districts of New York County, does not take effect until January 1, 1963, with respect to any particular Congressional District, except as those lines are to be used for the primary and general election. That as of now, while designating petitions have been filed by a number of persons who are seeking nomination in one party or another so as to permit them to appear on the ballot for the general election in November, those petitions do not as of this moment, not having been acted upon by the Board of Elections, ever presumptively give them the right to appear on the primary ballot as of this moment.

This is merely a statement of intention to run with an appropriate number of signatures behind it. And I don't know, therefore, that anybody has a vested right to the lines of any particular Congressional District, and I don't know that anyone is, therefore, a necessary party to this lawsuit.

I note, in passing, that in the Honeywood Case, with which I know Judge Moore is familiar, the incumbent congressman was joined as a party with an attempt on the part of the plaintiffs, to enjoin him from running. We took no such course here. We didn't think it was appropriate, [fol. 14] we didn't think it was legally permissible or acceptable, so that I do not think that Congressman Powell has any special position in this proceeding at this time.

Mr. Seavey: Your Honor, if I may be heard, I represent personally Mr. Jones. Mr. Sandifer has very well stated

our position, but in light of Mr. Feldman's last remarks I would like to clarify one or two other matters.

I have just briefly, and for the first time, looked at the complaint, and I have only gotten as far as Page 2. The complainants here, through their respective attorneys, request that this court consider this matter as a class suit. They then allege that the people, four or five or eight of them here, duly and fairly represent the class.

We object to this. As a matter of fact, I have never heard of a class suit or a taxpayers' suit where a person vitally affected was not permitted on oral application or on proper application to intervene when he was being affected.

As a matter of fact, this is the first lawsuit that I have ever seen where party "A" purportedly sues party "B" seeking a judgment against party "C", and party "C" is [fol. 15] not a party to the action.

Now, party "C" here is not only Mr. Congressman Powell, but he is the bulk and file and the people in these districts who will also be affected, he is the district leader in the districts, the State Senator, the City Councilman in the district. All these people are affected, and there is a great question in my mind concerning jurisdiction, due process.

When a court convenes with only eight plaintiffs, and there is no proper formal notice given to the class of people who will be affected, I do think the court should take into consideration whether it has jurisdiction in light of the fact that some of us here, who seek to represent people who will be affected, seek to intervene, seek to become parties to the action, so that we may properly find out what this case is about, properly represent ourselves, properly represent our clients.

I therefore vigorously urge the court that they allow us, because we are the persons against whom a judgment one way or the other, one way or the other, whether the plaintiffs won whether the defendants won would be affected.

[fol. 16] Judge Moore: We will take a recess for five minutes.

(Recess taken.)

Judge Moore: Mr. Sandifer, you must realize that your application made at the commencement of this hearing is

not altogether timely, particularly in view of the fact that the complaint has been on file for some time. However, the Court is disposed to favorably consider your application to this extent.

We believe that your petition, and that of your clients should be set forth in the formal papers to intervene, and on such pleadings as you think are justified under the circumstances. If you can file those by 4:00 o'clock tomorrow afternoon, and then be prepared to go ahead with any material that you wish to submit to the Court on Wednesday of next week, your application will be granted.

Mr. Sandifer: Thank you very much.

Judge Moore: Are you prepared to conform and comply with the conditions?

Mr. Sandifer: Yes, I am.

Judge Moore: And are your colleagues, if they are going to be in the same position, also so prepared?

Mr. Chance: If I could make one inquiry, Judge, you [fol. 17] did say that you anticipated proceeding with this hearing today; is that correct?

Judge Moore: We do.

Mr. Chance: Would we have the right, or could we reserve the right, or could we have the witnesses who so testify to return for the purpose of cross-examination on any points we feel they should be examined that would affect our position.

Judge Moore: I think you probably are protected there, because Mr. Galt has been given that right in our pretrial conference to cross-examine any witnesses who are called this morning on Wednesday, and I see no reason why you can't have that same opportunity.

Mr. Chance: I would appreciate that, because I am in a position that I don't know. I took the position that there was no notice. Let us assume that there was a letter. This is a proceeding—

Judge Murphy: Why should we argue the point?

Mr. Chance: No, sir, but the right of cross-examination is what I am talking about.

Judge Moore: This matter must be concluded, if possible, on Wednesday of next week, and so you will be pre-

[fol. 18] pared with all the information and material which you wish to submit by then.

Mr. Feldman: May I just ask, do I understand that the application will be granted to the extent of permitting these persons to intervene as parties defendant?

Judge Moore: We are in no position, Mr. Feldman, to put them in any category, because we have not seen the papers, and that is why we are directing that they submit written papers stating the nature of their intervention.

Mr. Feldman: I had understood your Honor to say that if they submit written papers by 4:00 o'clock tomorrow afternoon and agree to go forward with their proof on Wednesday that their application would be granted.

Judge Moore: That is correct, and it is up to them to—

Mr. Feldman: I was asking what application would be granted.

Judge Moore: The application to intervene.

Mr. Feldman: As—

Judge Moore: As whatever the papers may show they may be called. We are not giving the animal a name at this [fol. 19] particular time because it may resemble the plaintiff, it may resemble a defendant, and it might not resemble either one, so it would be best not to form a conclusion in advance.

Mr. Feldman: Fine. Thank you, sir. I just wanted it clarified.

Judge Moore: Now, we are ready to go ahead, and I would ask first counsel for the Attorney General if you will state on the record the waiver of the statutory five-day notice so that we may proceed.

Mr. Galt: The Attorney General waives the statutory requirement, if any, for five days notice of this hearing.

Judge Moore: And also on behalf of the Governor?

Mr. Galt: On behalf of the Governor, the Secretary of State, and Attorney General pro se.

[fol. 23] STATEMENT BY MR. OFFNER ON BEHALF OF
BOARD OF ELECTIONS OF THE CITY OF NEW YORK

Judge Moore: I assume that you, too, waive notice?

Mr. Offner: We do.

May I state for the record at this time that those defendants constituting the Board of Elections take no position as to the merits of this action. We intend to call no witnesses and, as a matter of fact, we, as in the Honeywood case, will not file an answer and I assume, under Rule 55, that whether we file an answer or not the Commissioners of the Board of Elections will be enjoined from acting only if the Governor, the Attorney General and the Secretary of State of the State of New York are enjoined.

[fol. 25]

STATEMENT BY MR. FELDMAN ON
BEHALF OF PLAINTIFFS

Mr. Feldman: Chapter 980 started under Section 111 [fol. 26] with the 1st Congressional District of the State of New York out at Suffolk County and worked its way west on Long Island through Queens into Brooklyn, and finally arrived in Manhattan, and the first district created by Chapter 980 was the 17th Congressional District, and the lines, as your Honors can see from this map, start at the northern boundary of Central Park and they go along the western side of Fifth Avenue, the eastern boundary of the park, including no persons living on Fifth Avenue below 110th Street or east of Fifth Avenue below 110th Street, until it reaches the corner of 98th and the park, where it proceeds one block east to Madison Avenue, one block south to 97th Street, one block east to Park Avenue, and then down to 91st Street, five blocks south along Park Avenue and then one block east to Lexington; then two blocks south to 89th Street and then over to the river.

We can find no rational basis for drawing the lines in that way. We intend to show that the effect of drawing the lines in that way is, as alleged in our complaint, to screen out the people who live within the other side of this jigsaw in the 18th Congressional District, and then the district proceeds down to the middle of the East River, taking in [fol. 27] Welfare Island, until it reaches 14th Street, where it comes west to First Avenue to take in Stuyvesant Town which, we will show, is a community of 23,000 persons of whom only 112 are non-whites or Puerto Ricans, in keep-

ing with the decision of *Darcy v. Stuyvesant* in the Court of Appeals of the State of New York, and then goes up along the border of Stuyvesant Town to 19th Street, where it cuts out another rectangle going down south to Greenwich Village, where it goes right behind the new, fancy housing project on West 4th Street in Washington Square Village, then wiggles around again until it gets over on 14th Street on the West Side and cuts over to Seventh Avenue and doesn't go up along Eighth, which it eventually meets at 34th Street, but cuts over to Seventh Avenue, along Seventh Avenue, and then approaches Eighth Avenue at 34th Street to include the area between Seventh and Eighth, where very few people live—basically in the garment center—and then when it reaches 54th Street deigns to come over again to include the housing project or the Coliseum area urban renewal project, and goes up along that way to include the New Lincoln Center area and again cuts over, this time to Central Park West, and goes up along Central Park West, the western border of Central Park West, to include [fol. 28] Columbus Avenue over to 73rd Street, and then cuts back across Central Park West to take in the squirrels in the park by going up the western border of the park or the easterly side of Central Park West back up to 110th Street, where again it edges along the southerly or the northerly border of the park, the southerly side of 110th Street, not including any houses facing on 110th Street, back to that point or place of beginning.

I don't know what rational basis the Legislature had for drawing lines of that sort, but after those lines for the 17th were drawn, then the lines for the 18th conformed, virtually (indicating) in this area, and the lines for the 19th just followed around to take in what the 17th left over, except that the dividing line between the 19th and the 20th was created along 86th Street and that, incidentally, is a straight line. No squiggles or wiggles or jigsaw.

Now, we tried to find out—although I don't know that the intent of the Legislature is important here—it is the result that counts—why they cut these areas out. We don't know. We don't presume to know. We will have no proof.

However, by virtue of these areas being cut out, we now end up with the fact that the four districts allocated

[fol. 29] to Manhattan Island are completely unequal. We will show that the population of Manhattan, according to the 1960 Census, is 1,698,000 persons. I believe it is 1,698,323.

Manhattan is an island, not a very complicated configuration, and there are many ways in which it could have been divided so as to provide four congressional districts of relatively equal size.

Judge Moore: Mr. Feldman, prior to the four, do I understand correctly that there were six congressional districts in Manhattan?

Mr. Feldman: That is correct.

Judge Moore: Is there any historical background with relation to the six in the designing of the new four?

Mr. Feldman: There is in this regard, sir, and we will show it on this map on your Honor's left, the map showing the six districts.

We also have a map which will show the 17th as it was, the 17th as it was being this green tape and the 17th as it is being the red tape, and we will show that the areas added to the 17th, since each of the four had to be larger than any one of the six—there not having been that much population change—we will show that the areas added [fol. 30] which fall between the red tapes and the green tapes are essentially white areas, and that the areas added—that even with the addition of the areas between the red tapes and the green tapes we up with a 17th Congressional District of only 382,000 persons.

Judge Moore: The green is the old, is it not?

Mr. Feldman: The green is the old and the red is the new, sir, yes.

Judge Moore: You are complaining of a jigsaw puzzle on the new that started around Fifth Avenue in one of the streets of the upper Nineties. Am I correct in believing that the same jigsaw, however, existed with the old 17th?

Mr. Feldman: On the northern boundary a similar jigsaw existed as to the old 17th but, sir, we don't feel that there is any concept of laches in a congressional district case of this sort. Constitutional rights were probably violated under the old 17th Congressional District.

Judge Moore: I may have misunderstood, but I did think that you were imputing to the Legislature some plan or

design in its new legislation which possibly had not existed in the old.

[fol. 31] Mr. Feldman: No, sir, I merely say that the effect of the new legislation is as we complain and it probably existed under the old, but it existed under the old to a lesser extent in this sense: As will be explained, these shadings, the shadings of census tracts, are to indicate the percentage of non-white and Puerto Rican persons in each of those areas.

Interestingly enough, in the old 17th, which was essentially a white, non-Puerto Rican district, they had to add more persons because we went from approximately 1,600,000 to—roughly the same number of persons. We went from six districts down to four districts, so they had to add some population, and they did in each district.

The population they chose to add, which could have been added by perhaps straightening out that northern boundary—you will note that not only was the northern boundary not straightened out but it was shoved farther south, because in the ten-year period the Negro population encroached farther south on the 17th District border, so that they did cut out this block, this area in here (indicating) between the green and the red tapes, and then continued to stagger, but in a slightly different way.

[fol. 32] But they chose to add the essentially white areas on the East Side where the population had changed somewhat through housing and rebuilding in the last ten years.

They chose to add the Stuyvesant Town area, which was essentially all white, 99.5 per cent white, non-Puerto Rican, and again they took what had been basically a straight line and added to it by the creation of that jigsaw line, so that regardless of the old 17th or the new 17th, we end up with an additional fact, and that is that the 17th, while they did have to add population and added white population in both areas, is, nevertheless, still 15.4 per cent smaller in terms of population than the 19th, 14 per cent smaller than the 20th, and 12 per cent smaller than the 18th. We will show what the effect would have been had they attempted to equalize in any one of four different ways, which could have been chosen by the Legislature if they had merely straightened out this border and equalized all around, how

many people it would have added, the equalization it would have created between the two districts, and how many of them, that would be Negro and Puerto Rican that would have gone into the 17th District without, incidentally, changing anything but the size and the under-representation in the 18th District, so that now a Negro's vote in the 18th Congressional District counts 12 per cent less than the votes of the essentially white voters in the 17th, whereas that could have been corrected without disturbing the 18th if the Legislature didn't want to disturb it, although we don't want to raise that question at the moment. I will get to that in a moment. Without disturbing the composition of the 18th, they could have drawn a straight line across and equalized between the two districts so that the Negroes and Puerto Ricans in the 18th would not be under-represented in that sense.

That is one alternative.

The other alternative for equalization would have been on the southern border, the 19th, which is on the southern border and which is 15.4 per cent larger than the 17th, and on the southern border they could have drawn a straight line across, and we will show the Court statistically where that line should have gone, how many people it would have added and the equalization that should have taken place so as to destroy the under-representation in the 19th and the over-representation in the 17th.

We will also show that they would have ended up with [fol. 34] a lot more non-whites and persons of Puerto Rican origin had they attempted to equalize the size of the two districts.

Those are two hypotheticals, and I suggest there are many. We don't presume to tell the Legislature how they should have done it, but it is clear that there are many ways that they could conveniently have done it.

Here, too, we will demonstrate three other possible constitutional alternatives that the Legislature could have chosen.

As I say, the island is roughly 1,698,000. These lines are drawn so as not to split census tracts. For ease of computation, one-quarter of that amount, that number, would be roughly 421, or 422,000 persons. It wouldn't have

made much difference if you had two or three thousand, more or less, in any one district. These lines were drawn for each of computation so as not to cut the census tracts in the preparation of the graphs. It is not to suggest that the lines should go necessarily the way they are indicated.

Here they could have divided the county into a northern district, a southern district and a midtown West Side district and a midtown East Side district. Every one of these [fol. 35] four districts would have been roughly equal in population and the analysis of the Negro and Puerto Rican population in the four districts would show that you wouldn't have too great a disparity there, either.

Similarly, they could have drawn it by having a northern district and a southern district, the same as there (indicating), a lower middle district and an upper middle district, and again they would be roughly equal in size with a different distribution of population by race and place of origin.

Here is another alternative. I am sure the alternatives could go on ad infinitum.

These are rational alternatives. They are drawn along census tract lines, roughly, to create equal numbers in all the four parts.

Lines drawn on the 17th, however, are not only irrational, but they create an unequal district. They create districts which discriminate.

That, basically, sir, will be our proof. I want to apologize to the Court before we commence proof for one thing. I had told the Court at pretrial conference that we would have one expert witness who had supervised preparation of the charts and the calculations.

[fol. 36] Unfortunately, this witness was taken to the hospital this morning, suffering from a diabetic condition. He had been up nights and weekends working hard on this material and the doctor required that he go to the hospital.

Not wanting to ask for an adjournment because of the importance of the case, we are prepared to call one of the persons who assisted him, but who does not have either the professional qualifications of the person who supervised the statistical project or the personal familiarity with some of the methods used in calculations.

[fol. 37] I am informed, however, that the person who did do this will probably be well enough to testify on Wednesday. Therefore, with the Court's indulgence, we would like to go as far as we can with the gentleman who assisted and can testify, reserving the right to qualify it to some extent and to augment it to some extent by the testimony of the person who is now in the hospital.

Before calling our first witness, I would like to introduce eight affidavits of eight of the plaintiffs, the ninth having been unavailable in this vacation schedule, and ask the Solicitor General to stipulate that if Yvette Wright, Benny Cartagena, Seth Dubin, Blorneva Selby, Joseph Erazo, Walsh McDermott, Horacio Quinones and Darwin Bolden were called to testify under oath they would testify essentially as set forth in these affidavits.

While Mr. Galt is looking at those affidavits, I would also like—and this being my season for apology, I would also like to apologize to the Court for a typographical error on the fourth line of the bottom of Page 5 of our trial memorandum, where the figures 39th should read 59th.

Mr. Galt: May it please the Court, we have examined [fol. 38] the affidavits. We have no objection to stipulating that these parties would so testify, if called, without, however, of course, conceding the accuracy of any of the sworn statements submitted. But we have no objection to the submission of these affidavits, and we will expressly stipulate that they would so testify, if called.

Mr. Feldman: In view of Mr. Galt's statement, I ask that these be made part of the record. Would your Honors want them marked as exhibits, or how would you like to have them treated?

Judge Moore: Mark them as one exhibit.

(Court's Exhibit 1 received in evidence.)

Mr. Feldman: I would like to call Mr. Clemente.

DOMINGO CLEMENTE, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Feldman:

Q. Mr. Clemente, what is your educational background?

A. Well, I have studied at the University of Paris, the University of Grenoble, where I am in preparation for a certificate of French studies, I am a graduate of Brooklyn [fol. 39] College, sociology, I have spent a year in graduate school at Columbia University, in the urban planning division.

Q. Do you have any professional—

A. I am also a provisional member of the American Institute of Planners.

Q. Mr. Clemente, I show you these papers marked 2-A, B and C, and ask you if you can identify them for me, please.

A. Yes. They are base maps for the Borough of Manhattan. The maps are also maps which I have prepared.

They are base maps for the Borough of Manhattan, and they are to show the old congressional districts, the new congressional districts, and a composite of the old and the new.

[fol. 40] Q. Mr. Clemente, you stated that one of them showed the old congressional districts, or the six congressional districts in Manhattan, one showed the four new districts, and the third was a composite of the two. Would you tell us which is which, please?

A. Well, Map A is the first map—that is the old showing the congressional districts.

Map B is the second one, and it shows the new lines.

Map 3, or C, is the composite of Maps A and B.

Q. Mr. Clemente, did you prepare these maps?

A. Yes, I did.

[fol. 41] Q. All three of them?

A. Yes.

Q. And did you prepare them from the Board of Election maps which you obtained from the New York City Board of Elections?

A. That is correct.

Q. And you then drew the lines in?

A. That's right.

Mr. Feldman: May I ask, sir, that the three maps be marked in evidence.

Mr. Galt: Your Honor, I suggest at this time they be marked for identification. It isn't possible for us to examine them in detail. I presume that they are accurate, and if they are, certainly we won't object to them.

Judge Moore: Why don't we take them subject to such corrections as you may wish to make after you have examined them.

Mr. Galt: Thank you, your Honor.

Mr. Feldman: And I would like to ask leave during the period of recess between today and Wednesday to furnish for the record photostats, or photocopies, photo reductions, of these maps while the originals at the end of the case be available in the clerk's office.

[fol. 42] Judge Moore: That would be helpful.

Mr. Feldman: Thank you, sir.

(Plaintiffs' Exhibits 2-A, B and C received in evidence.)

Q. Now, Mr. Clemente, did you also prepare any, or work on any population studies and analyses of population groups for Manhattan in connection with the preparation of these maps?

A. Yes, I did.

Q. And did you do that directly or under supervision, or just what did you do with respect to that?

A. Well, I prepared the figures, compilation, under supervision. I merely assisted in the preparation, and I collected material. I transcribed the figures from official material, and I did some of the tabulations, but most of them were done by Mr. Limoge, who unfortunately is ill.

Q. Is that Mr. Edward Limoge?

A. Yes.

[fol. 43] Q. Mr. Clemente, had you ever done such work before?

A. Yes, I had. I worked on the Mayor's committee on registration on a study for the voter registration, Manhattan, Bronx, Queens, Richmond, the five boroughs.

Q. What materials did you use in the preparation, what basic materials did you use, what were the sources of your statistics in the preparation of these studies?

A. I relied very heavily on census data. I used the—I have some of the material here. I used the U. S. Census of Housing for 1960 for Manhattan Borough, which describes city blocks, and in it it gives data on census tracts, blocks within the census tracts, housing conditions, it gives occupancy, according to rent—whether it is rented or owned—[fol. 44] and it also gives occupation according to—well, by non-white.

I also used—

Q. Just one moment, please, Mr. Clemente. You have used the phrase "census tracts." Would you tell us what a census tract is?

A. A census tract is an arbitrarily defined universe for the purposes of counting people in several city—it may include three or four blocks, in the average New York City blocks about six blocks, six square blocks.

Q. By whom is this arbitrarily determined?

A. By the Bureau of the Census.

Q. Do you have a census map with you?

A. Yes, I do.

Q. This is the census tract map of Manhattan in two sections; is that correct?

A. That's right.

Q. And these various shapes that we see on it, some of which are rectangular, some square, some polygons with numbers in them, are they the census tracts?

A. Yes, these are the census tract numbers.

Q. And define the area of the census tract?

A. That's right.

Q. And the census material is published by—and statistics are published by census tract?

A. That's right.

Q. And in some cases by parts of census tracts; is that correct?

A. By parts of census tract, I don't know, I'm sorry.

Q. Do they also have such things as enumeration districts?

A. Yes.

Q. Those constitute parts of census tracts?

A. That's right.

Q. But you use this census tract map as your reference to the Bureau of Census material so as to locate the areas which you are statistically observing, is that correct?

A. Yes, that is correct.

Q. How many census tracts are there in Manhattan?

A. I think there are 257 in Manhattan.

Q. Apart from the U. S. Census of Housing for Manhattan, which you referred to, that was the 1960 U. S. Census for Housing, was it not?

A. That's right, yes.

Q. Did you use any other material?

A. Yes, I used Table P-1, which is entitled, "General [fol. 46] Characteristics of the Population by Census Tracts, 1960," and this shows—

Q. Published by whom, sir?

A. Published by the Bureau of the Census.

Now, these statistics are based on a 25% sample, and it shows—well, race and country of origin, population characteristics, and other data. I used this material because it had a great deal of information on white, negro, and other races, and Puerto Rican population characteristics.

Q. Are those the only publications you used?

A. I also used another table, and I believe that is Table P-5. Unfortunately, I don't—

Q. Is that entitled "General Characteristics of the White Population with Spanish Surnames"?

A. Yes, that is correct.

Q. And that, too, is published by the—

A. By the U. S. Bureau of Census.

Q. In using these materials, what did you do?

A. Well, as I said earlier—

Q. First, let me ask you this way: did you arrive at a figure for the total population of Manhattan?

A. Yes, I did.

Q. And can you tell us what that figure was or is according to your census data?

A. The total figure—if my memory serves me it is 1,686,400.

Q. Why don't you check your notes, if memory doesn't serve you?

A. 1,698,281.

Q. 1,698,281?

A. That's right.

Mr. Feldman: I would ask the Court at this point to take judicial notice of the fact that the population figures for each of the four congressional districts created by Chapter 980 of the Laws of New York of 1961, are as set forth in that statute, namely, 382,320 for the 17th Congressional District, 431,330 for the 18th Congressional District, 445,175 for the 19th Congressional District, and 439,456 as set for the 20th Congressional District.

Judge Moore: I assume, Mr. Feldman, before you finish you are going to give us the voting population as well?

Mr. Feldman: I don't know that I do, sir. The voting population—I can give you the voting population for the 17th. We can get it for you with respect to the others, if the Court desires.

[fol. 48] Judge Moore: Wouldn't it have some relevance to your case, to show the voting population as well as the actual population of the four congressional districts involved?

Mr. Feldman: No, sir, I don't believe it would, because a person who votes this year is not necessarily a voter next year, and vice versa.

Similarly, a person who is not 21 this year may be 21 and vote next year. These congressional districts are created on a decennial basis to last a ten-year period and the voting statistics in any one year wouldn't be applicable.

Furthermore, the Congress, the Congressional Statute, 2 USC, Section 2-A, mandates that the congressional dis-

tricts be apportioned on the basis of total population, excluding Indians. There is no reference—

Judge Moore: That is a pretty dangerous exclusion, when you are talking about Manhattan Island.

Mr. Feldman: I gather they felt safe at this point, sir.

But the fact remains that the Congress is itself apportioned among the various states on the basis of total population, and the apportionment within the states is again on the basis of total population, so the Congress and the [fol. 48a] states deeming the numbers of voters irrelevant, sir, I have agreed.

Judge Moore: All right, proceed.

[fol. 49] Q. From these tables, did you proceed to make calculations as to the number of non-white persons, and persons of Puerto Rican origin, who reside in each of the four Congressional districts in Manhattan, Mr. Clemente?

A. Yes, I did.

Q. Can you tell us what those numbers are?

A. Well, in the 17th District, there is a total population of 382,320. Now, the population breakdown—

Mr. Galt: May I interrupt a second, your Honor, to ask for clarification? Is this on the new districts or old districts?

Mr. Feldman: This is on the new four districts, Mr. Galt.

Mr. Galt: Thank you.

A. (Continuing) And these figures will show the population and racial and group composition of the four districts, and they are based on the 1960 census figures.

Judge Feinberg: Are these the figures set forth on page 3 of your memorandum, Mr. Feldman?

Mr. Feldman: Yes, they are. Thank you, your Honor.

Q. Mr. Clemente, did you prepare and furnish the figures [fol. 50] set forth on page 3 of the trial memorandum submitted to the Court for the white population, non-white and Puerto Rican population of each of the districts, the percentage figures, the breakdown between non-white and persons of Puerto Rican origin in each of the districts, and the percentage figures of non-white and persons of Puerto Rican origin in each of the districts?

A. Yes, I assisted in the calculation of those figures.

Q. Are those figures therein set forth accurate, Mr. Clemente?

A. They are.

Mr. Feldman: May I ask, sir, the figures set forth on the table on page 3, for the convenience of the Court, be considered part of the record, the figures set forth on the table and the tables on page 3 of the plaintiffs' trial memorandum?

Judge Moore: Yes, I think that will be a convenience.

Judge Feinberg: It will save time.

Mr. Feldman: May I for the convenience of the record, sir, suggest that they be marked as an exhibit, and included in the record?

[fol. 51] Judge Moore: It will be deemed to be Exhibit 3 then.

(Document deemed marked Plaintiffs' Exhibit 3 in evidence.)

Q. Did you also compare the total population in terms of number of the 17th Congressional District with each of the other three Congressional Districts?

A. Yes, I did.

Q. And is it true that the 17th Congressional District is 12 per cent smaller in terms of number of persons than the 18th, 15.4 per cent smaller than the 19th and 14 per cent smaller than the 20th?

A. Yes, that is correct.

Judge Moore: Mr. Feldman, before you get to another [fol. 52] topic, I notice on Exhibit 3 that Mr. Clemente has singled out what he calls non-white and Puerto Rican races. I am assuming that there are other racial groups in Manhattan, and I am wondering whether he made comparable studies with respect to other races and took those into consideration, and if not, why not.

Q. Will you tell us what non-white includes in those figures, Mr. Clemente?

A. Well, non-white also includes—let's see, non-white also includes Puerto Ricans who are considered Negro, but

who because of their Spanish surname are included in a special category by the Census, so this is the reason, one of the reasons, we used this category.

Now, we did include other races also since non-white includes Chinese, Filipinos, and, I think, Indians, American Indians, and all who are not Anglo-Saxon, in a way, or who do not come from some of the European countries.

Judge Moore: I was really wondering if you had made a study as to what impact this new redistricting or the new four congressional districts may have on such races, say, as the Italian or the Spanish or the Jewish.

The Witness: Well, according to the table P-1, general characteristics of the population, the people from the United [fol. 53] Kingdom, Ireland, Italy, are included in the white population, and people who were born in Puerto Rico or who are of Puerto Rican parentage, are isolated, and then the Italians, the Swedes, et cetera, are included as members of the white race, and then you have Negroes, and then you have your other races, and that "other races" includes the Filipinos, as I said, Orientals, et cetera.

Judge Moore: That doesn't quite answer my question.

Mr. Feldman: Perhaps I might assist, sir.

Judge Moore: I had understood from Mr. Feldman's opening that he thought that certain races that you describe here as non-white and Puerto Rican had been what he called excluded or "included out."

Mr. Feldman: "Fenced out," I said, sir.

Judge Moore: Fenced out. And I am just wondering whether in this redistricting other racial groups had been fenced out, and, if so, did you consider that in any of the conclusions that you are about to give us?

Mr. Feldman: May I suggest, sir—

Q. Mr. Clemente, the census figures which you used, do they describe any races other than Negro and non-white [fol. 54] as races?

A. No, they don't.

Judge Moore: I see.

Q. And do they describe any persons in terms of place of origin other than persons of Puerto Rican origin?

A. No, they don't.

Judge Moore: That answers the question.

Q. Mr. Clemente, I show you a chart now on the easel with the arabic number 1 in the upper righthand corner, and ask you if you can identify that chart?

A. Yes. It is a map which shows percentage of white Puerto Rican and non-whites in the 17th Congressional District, and the surrounding areas of the 17th Congressional District.

Now, the chart is so prepared as to show the density of the non-white and the white Puerto Rican population, and it is arranged according to percentages, and you will see there is a hierarchy of total values. Light is zero to 4.9 per cent and, going to the last one, which was very dark, it is 75 to 100 per cent.

Judge Feinberg: Excuse me, Mr. Feldman. 75 to 100 per cent what?

The Witness: Well, that is percentage of—

[fol. 55] Q. You mean 75 to 100 per cent non-white and Puerto Rican?

Judge Feinberg: Is that what you mean?

A. That's right.

Judge Feinberg: Does that map reflect three categories—white, Puerto Rican and non-white, or two categories, white Puerto Rican and non-white?

Q. Or just one category, non-white or white—I am sorry, you are right, white Puerto Rican and non-white as one percentage of the total population of the area described, or, to put it another way, Puerto Rican origin and non-white, as a percentage of the total population of the area; is that correct?

A. That's right.

[fol. 56] Judge Feinberg: White Puerto Rican on that map means the same as Puerto Rican origin in the figures you have given us in the past because the phrase "white Puerto Rican" on that map is a little confusing.

Q. Mr. Clemente, included in your non-white figures, as I understood your testimony, there were persons of Puerto Rican origin who were deemed non-white, is that correct?

A. That is right. There is 5.5 per cent of the population from Manhattan only.

Q. 5.5 per cent of the Puerto Rican origin population is non-white, and is included in the non-white figure?

A. That is right.

Q. Therefore your Puerto Rican origin and non-white figure here is based upon the Puerto Rican and non-white figure in the exhibit now marked in evidence, is that correct?

A. That is correct.

Q. Those are comparable figures?

A. That's right.

Q. Now, Mr. Clemente—

A. I would like to add one thing, which he overlooked. Now, those patterns are laid over census tracts and that [fol. 57] is the unit, and I am sorry I didn't point this out before, but each one of those blocks represents a group of blocks which have people living in houses, so to speak, population.

Q. So as to further explain, Mr. Clemente, I would just point to one checkered square at the top. That is a checkered square which would consist of one or more census tracts, but complete census tracts, whether it were one or more, no parts of any census tract, and would represent the percentage for that entire area, is that correct?

A. That's correct.

Q. And would, therefore, assume that within that area the percentage was uniform, is that correct?

A. That's correct.

Q. Do you know whether it is necessarily true that within an area such as those described by one of these squares the percentage is uniform?

A. I would say that is a very difficult thing because we would have to count each individual person living on that block or in that census tract.

Q. And, therefore, have you, since this has been prepared only by census tract, on a census-tract basis, have you done anything to obtain more detailed or more refined figures [fol. 58] on a block-by-block basis within census tracts for persons of Puerto Rican origin and non-white?

A. Yes. We are awaiting a hand tally which is being undertaken in Jefferson, Missouri, by the U. S. Bureau of the Census, and we are hoping to receive this material soon, because it does list individual by individual.

Q. And that will permit you further to refine these squares, is that correct?

A. Yes, that's correct.

Q. So that these squares are now based upon the census tract as a whole without the breakdown, is that right?

A. That's right.

Q. Would you explain the key or the numbers on the lower righthand side, and why they break where they do?

A. Well, one reason—we have eight classes there, eight classes that are statistical classes, and one reason is it is simply a matter of convenience because we had to decide somewhere along the line where we should break, and it is very evident, for example, in the northern part of this map that the percentage of population is very high and that in the central eastern section the population is very low, so it is just a matter of—it is a time-saver. It wasn't [fol. 59] important to really go into great detail.

Q. You mean to break it down in a more refined way?

A. That's right.

Q. I also note, Mr. Clemente, that was in this area that I am pointing to on the upper east side of Manhattan, there seems to be a difference in shading between the portion on the east and the portion on the west that is not represented in the map. Is that shading meant to be the same? Would you explain that for us?

A. Well, that was in error. This map was reproduced and it had to be—well, it just had to be composed because it was such an enormous map, and so that section, the gray section there, is a photostat.

Q. But the key is meant to be exactly the same in spite of the apparent difference of shading in there, is that correct?

A. That is correct.

Q. As I gather, Mr. Clemente, this first key shading—excuse me.

Did you prepare the map? Did you prepare the statistics from which the map was prepared?

[fol. 60] A. I prepared the map and assisted in the preparation of the statistics.

Q. And you actually placed these various shaded areas on the map in accordance with the statistics?

A. That's right, yes.

[fol. 65] (Document marked Plaintiffs' Exhibit No. 4 and received in evidence.)

Direct examination.

By Mr. Feldman (Continued):

Q. Now, Mr. Clemente, I have just placed over the map marked Plaintiffs' Exhibit 4 in evidence an acetate overlay containing a red-and-white marked tape. Can you see that?

A. Yes, I can.

Q. Will you tell us what that acetate overlay is?

A. Well, the red outline is to show the new—the boundaries of the new 17th Congressional District.

Q. Did you prepare that overlay?

[fol. 66] A. Yes, I did.

Q. And that, too, was prepared from the Board of Elections' maps?

A. That's right.

Mr. Feldman: May I ask that the overlay be marked in evidence.

Judge Moore: Since it is attached to the other do you want it 4-A or 5?

Mr. Feldman: 4-A would be all right, sir.

(Document marked Plaintiffs' Exhibit 4-A and received in evidence.)

Q. Now, Mr. Clemente, those are the lines of the 17th Congressional District, the new 17th District, are they not?

A. Yes.

Q. We note from looking at the exhibit that the bulk of the area is shaded in a particular way. Is that the shading which you have designated on your key 0 to 4.9 per cent?

A. Yes.

Q. And what does that mean?

[fol. 67] A. That means that in that area you will only find out of the total population of, say, 100, only from 0 to 4.9 per cent of population of white Puerto Rican and non-white.

Q. I note that there are other areas, other shadings, included in that area. Can you tell me what those shadings are?

A. Well, let's see. We have an anomaly down in the southeastern—

Q. Excuse me.

A. All right.

Q. Just tell me before that: I notice a shading in the central northern portion of the district along the East 98th Street, 97th Street, 96th Street borders, there is a shading that is different from this shading, is there not?

A. Yes.

Q. That is the shading that is marked 5 to 9.9?

A. That's right.

Q. Now, I notice that that shading is for an area of fourteen square blocks and the same shading persists. Can you tell me whether that means that in every one of those blocks there are between 5 and 9.9 per cent of the persons who are Negro and Puerto Rican origin?

[fol. 68] A. I can't say for every one of those blocks but we will say for the total that there is—that this percentage of the population does exist.

Q. Have you had occasion to review the number of non-white housing units in that entire area?

A. Yes.

Q. Is it true, Mr. Clemente, that forty-five per cent of the non-white housing units in this entire area described as 5 to 9.9 per cent exists in the one block just north of the 17th, from 97th Street to 98th Street, between Park and Madison?

A. Yes.

Q. Is that true?

A. Yes.

Q. Mr. Clemente, I notice that going to the next tract over, or the group of tracts, similarly we have fourteen

square blocks as shaded similarly, which, according to your key, would be between 15 and 19.9 per cent Negro and Puerto Rican origin, is that correct?

A. Yes, that is correct.

Q. Is it also correct that in that fourteen-block area only four blocks are included in the 17th, and ten blocks are excluded from the 17th? Is that correct?

A. That is correct.

[fol. 69] Q. Can you tell us, without the additional data you say is being tallied in Jefferson, Missouri, how many of the Negro and Puerto Rican persons within that col-oration exist on the four blocks within the district as opposed to the ten blocks that are outside of the district?

A. Well, I would have to know the census tract numbers in order to answer that.

Q. Can you refer to your notes?

A. Yes.

Q. Do you want to approach the map for the purpose of identifying the area I have in mind?

A. Yes.

[fol. 70] By Mr. Feldman:

Q. Would you want to approach the map, Mr. Clemente? Would you want to have the question read back to you or do you have it in mind?

A. I have it in mind.

Judge Moore: It would help me, at least, Mr. Feldman, if you were to give us a segment of the significance of what Mr. Clemente is about to do in relation to your general thesis.

Mr. Feldman: Well, sir, we have an area here which has been shaded as being between 15 and 20 per cent, for the sake of convenience, non-white, which is on the border of the district.

It would appear, since the shading is on a census-tract basis, that there are at least four blocks with that high concentration of non-whites and Puerto Ricans included in the district, and only ten excluded from the district.

[fol. 71] It is my thesis that the percentage for the tract is an undistributed percentage and that actually the numbers of persons in terms of total population who result producing the fifteen-to-twenty per cent category reside outside of the 17th have been excluded from the 17th and that it does not include such persons in that one area which would apparently be included by virtue of the map.

I don't know if I make myself clear, sir.

Judge Moore: I think you do, but your shading there is so light and your percentages so small that I was just wondering how that helped you to make your point. If it had been a high percentage I could see that you might have—

Mr. Feldman: My point is that even where the percentage for the over-all tract is so small they cut the line because it is so much smaller on the portion inside the district than it is on the portion outside of the district, but nevertheless they felt that they wanted to include the smallest possible percentage and not even take in the entire tract.

Judge Moore: Then you said that they wanted to include, it seems to me—

Mr. Feldman: Well, the purpose and effect of the statute, [fol. 72] I will put it.

Judge Moore: When you get to the green overlay, which is the old, as I understand it, that is going to coincide identically with the red line you are talking about now.

Mr. Feldman: Yes, almost identically.

Judge Moore: So that what you are complaining about is what was done ten years ago or more.

Mr. Feldman: In the 1953 apportionment, but carried through.

Judge Moore: There is no change from what was done ten years ago?

Mr. Feldman: That I don't know. The line may be the same but the population may be different.

Judge Moore: Let Mr. Clemente go ahead, anyway.

Mr. Feldman: You just noticed the area on the census tract for identification?

The Witness: Yes.

[fol. 73] Q. What can you tell us about the portion of that area that is shaded 15 to 20, or 15 to 19.9 per cent, that is included within the 17th as included to that portion which is excluded from the 17th in terms of persons who are of non-white or Puerto Rican origin?

A. In the inside section, that is census tract 158, in the inside portion that is the west section of that boundary line, the total population for the total census tract—that is, 158—is 10,377.

The percentage of white Puerto Ricans and non-whites is 17 per cent for the total census tract.

Q. Can you tell us how many of the ten thousand—300, was it?

A. 10,377.

Q. —people of that census tract live within the 17th?

A. The total non-white population is 455, which represents .7 per cent of the total—that is, the total population of 10,377 for the entire census tract.

[fol. 74] Q. The total population of the census tract is ten thousand three hundred and what, sir?

A. 77.

Q. Right. And the population of that census tract that is within the 17th is what?

A. In the 17th it is—well, it represents, let's see, 3056, or 13.3 per cent of the total population. That is within the 17th.

Q. I believe you said that the population of that census tract was 10,377.

A. That is correct.

Q. So that there you talk about a percentage of non-white and Puerto Ricans of between 15 and 19.9 per cent, is that correct?

A. That's right.

Q. Now I notice that immediately adjoining that census tract 158 is a census tract which is designated on the chart as between 75 and 100 per cent non-white and Puerto [fol. 75] Rican. Can you tell us what the population of that census tract is?

A. I will have to come up and look at the map.

(Witness approaches map.)

A. (Continuing) Is this the one that you referred to (indicating)?

Q. No, the one above 158. And while about it I will ask you about the one adjoining it, so that you might as well get that tract number, too.

The first one I asked you about is the census tract immediately north of the one that we were just talking about, which commences at 98th Street and runs from 98th to 95th, between Third Avenue and Park Avenue. Have you identified that tract?

A. Yes, that is census tract 166.

Q. And that is the census tract which shows on the map as being 75 to 100 per cent non-white and Puerto Rican persons, is that correct?

A. Yes, that is correct.

Q. And what is the population of that census tract?

A. It has a population of 11,014.

Q. And it is roughly equal in area in that they both occupy the same number of square blocks and roughly equal in population, is that correct?

[fol. 76] A. Yes, that is correct.

Q. How about the tract immediately north of the 98th Street border of the 17th?

A. Would you mind pointing to that again, please? I am sorry.

Q. This is the tract right here, running from 98th Street to 106th Street, between Park and Fifth.

A. That is census tract 168. It has a population of 9772.

Q. And that, too, has a non-white and Puerto Rican percentage between 75 and 100, is that correct?

A. That is correct.

Q. How about the census tract just immediately below that, which is designated as between 5 and 9.9, that runs from 98th Street south to 91st Street, from Fifth Avenue over to Park Avenue?

A. That is census tract 160. It has a population of 9346.

[fol. 86]

Transcript of Proceedings—August 15, 1962

Mr. Feldman: May it please the Court, you will recall that when we concluded last Wednesday, the witness Domingo Clemente was on the witness stand having in a sense been a substitute witness for Mr. Edward Limoges, who had been taken ill to the hospital that morning. Mr. Limoges came out of the hospital at 8 o'clock this morning. Mr. Limoges was the supervisor of the project in which Mr. Clemente testified. I would like to expedite matters to put Mr. Limoges on the witness stand now. I believe the cross-examination of Mr. Limoges could satisfy the defendants as to any of the items concerning which Mr. Clemente testified, and if not Mr. Clemente would remain available for cross-examination at the conclusion of Mr. Limoges' cross-examination, but I think there would be no useful purpose served in proceeding to the cross-examination of Mr. Clemente at this point prior to the conclusion of the plaintiff's direct testimony through Mr. Limoges.

Judge Moore: I am sure your opponent would tell you [fol. 87] if Mr. Limoges is inadequate and Mr. Clemente will be subject to call in the event there are special questions that they wish to ask him on cross.

Mr. Feldman: Fine, that will be satisfactory then, sir.

EDWARD LIMOGES, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Feldman:

Q. Mr. Limoges, will you tell us a little about your educational background, please?

A. Yes, well, briefly I have a Bachelor's degree, a B.A. with specialization in the social sciences from City College, I am now studying for a Master's degree in city planning at Columbia University, I have 48 points toward that de-

gree. My courses have included the use of statistical materials including census publications.

Q. How many credits do you have in the use of statistical materials, academic credit?

A. For that 6 I believe it is—no, 4. This is specifically the use of census and other publications.

[fol. 88] Q. Have you had any courses in population geography or demography or whatever that is?

A. Yes, I have several courses in geography, I have had courses in sociology, I have had a course in urban geography, which included studies of city populations.

Q. Now, Mr. Limoges, I show you what has now been marked in evidence as Plaintiff's Exhibit 4 and 4-A, 4 being a map, shaded map of a portion of Manhattan, and 4-A being an overlay describing the lines of the 17th Congressional District, the new lines of the 17th Congressional District. Were those exhibits prepared under your supervision and direction?

A. Yes, they were.

Q. And with your participation?

A. Yes, yes, sir.

Q. And did you supervise the preparation of the calculations?

A. Yes, I did.

Q. That went into the making of Exhibit 4?

A. Yes, I did.

[fol. 89] Q. Now, Mr. Limoges, the question arose last Thursday whether in the preparation of these statistics, reflected on Exhibit 4, and in the preparation of the statistics contained on a table which appeared in the plaintiff's trial memorandum which is now in evidence as Plaintiff's Exhibit 2, there had been what has been referred to as double counting of those Puerto Ricans, or those persons of Puerto Rican origin who may be non-white. In the total figure of non-white and persons of Puerto Rican origin. Can you explain how the figures for non-white and persons of Puerto Rican origin were arrived at?

A. First of all let me get my statistics on that particular calculation.

Q. Well, Mr. Limoges, just overall, I don't think we need to go into the details at this moment of each of the calculations, but were any persons counted twice in arriving [fol. 90] at the total figures reflected in Plaintiff's Exhibit 2 or in percentages reflected in Plaintiff's Exhibit 4?

A. No, sir, the problem with the non-white Puerto Ricans is that they are counted twice, either—first either as negroes or other races and second as Puerto Ricans.

Q. You mean on the raw census data?

A. On the raw census data. For census tracts having 400 or more Puerto Ricans a count of non-white Puerto Ricans is available. For those under 400 this is not available as it is an insignificant number. In the calculations for this map, where there were over 400 Puerto Ricans in a tract we did have an absolute number of non-white Puerto Ricans that were subtracted from the total Puerto Ricans to give a white Puerto Rican remainder. Where the number of Puerto Ricans was under 400, it was necessary to make an estimate of the non-white Puerto Ricans. I think it is important to point out here that the total number of non-white Puerto Ricans is rather small, it is 12,000 out of approximately 225,000 Puerto Ricans. But aside from that, it was necessary to make an estimate as the determination non-white Puerto Ricans was made by [fol. 91] the individual census enumerators, and this was strictly on an individual basis. There is little or no pattern that can be found, little or no rationale for this determination. It depended upon the individual enumerator.

Q. You mean the subjective determination by the enumerator of the color of the interviewee's skin?

A. Yes. In some cases no non-white Puerto Ricans were tabulated, in others, quite a few. What I did in tracts of under 400 Puerto Ricans—well, I took each Congressional district. For each Congressional district I tabulated those tracts having 400 or more Puerto Ricans. I then took the non-white Puerto Rican figure for these particular tracts and determined what percentage of all Puerto Ricans in these tracts of 400 or more will be counted as non-white, and then this percentage was used as a standard subtraction. At the end it was necessary to make a slight adjust-

ment for the four Congressional districts as it is impossible to say exactly how many non-white Puerto Ricans there were.

Q. You mean out of the 12,000 you had, there is some statistical error in apportioning the 12,000 among the four districts?

A. Yes. It is unavoidable.

[fol. 92]

By Judge Moore:

Q. May I ask, Mr Limoges, these census tract figures that you speak of, are they published under the auspices of the Census Bureau?

A. Yes, they are.

Q. And from that source you obtain the information that you have been giving us?

A. Yes, these are all public documents.

Q. Now in that publication, they give the number of Puerto Ricans in each tract?

A. Yes, they give those of Puerto Rican birth and those of Puerto Rican heritage.

Q. And the number of non-whites also in the tract?

A. Where there are 400 or more Puerto Ricans they give this count. It was done in all, but it's available only for those with 400 or more.

Q. When there are 400 or more persons of Italian race in any particular census tract, is that published?

[fol. 93] A. For each census tract, figures are available on I believe those of foreign birth and those of one or both parents that are born in a foreign country, and this is broken down by country.

Q. In other words, if we wish to look at any tract, we would find the racial origin of all persons in this particular area?

Mr. Feldman: Sir, may I at this point—I don't like to object to questions by the Court—but I think there are assumptions in the Court's question about racial origin relating to place of birth.

Judge Moore: I am really trying to find out, Mr. Feldman, whether in the preparation of a Census Bureau sta-

tistic there are two groups singled out or whether it is applicable to all races regardless of the country of origin.

Now, if you want to develop that through Mr. Limoges, you do it, but I am merely searching for information. Thus far we have been told non-whites and Puerto Ricans, and I am sure that there are more than non-whites and Puerto Ricans in this fair city of ours, and I just wondered whether the Census Bureau confines its investigations and its interrogations to these particular classes.

[fol. 94] By Mr. Feldman:

Q. Do you have with you Table P-1?

A. Yes, I do. This is Table P-1. These are all actually advance sheets. These are photostatic copies of the original census sheets. For each tract there is a figure for a total population and then a breakdown, white, Negro, other races, and then another count, born in Puerto Rico, Puerto Rican parentage, and the section is foreign, total foreign stock, and that is comprised of foreign born, and, second, native—native or mixed parentage, meaning someone who is born in this country and one or both parents born in another country, and then there is a listing, about fifteen nations listed here.

Judge Feinberg: For example, what nations are listed there?

The Witness: United Kingdom, Ireland, Norway, Sweden, Poland, Austria, Hungary, USSR, Canada, Mexico, all other.

So it is the major foreign groups, but the Puerto Rican count, that is a separate thing, and I think it's done for New York because it is such a large Puerto Rican population and it is of special interest, and it is given a separate place in the census table here.

[fol. 95] Q. Now, Mr. Limoges, since this map was prepared on a census tract basis, was it not—

A. Yes, sir.

Q. So that each group of shadings is of a census tract and total percentages in a census tract, have you since the time that this map was prepared been able to obtain

any additional figure so as to permit a distinction to be drawn between the percentages of non-whites and Puerto Ricans of a tract inside the Congressional, 17th Congressional District as opposed to those outside the Congressional District.

A. Yes.

A. (Continuing) We have obtained from the Census Bureau in Washington count by enumeration districts. These are the areas a part of a block or a block or two or more blocks which were assigned to the individual census enumerator, and the Census Bureau has done a hand tally for us, they have gone back to the original enumerator's report.

They have counted the total number of Puerto Ricans, Puerto Rican births, Puerto Rican parentage, and they have given these to us on the basis of enumeration districts and—

Q. And as a result of that have you been able to calculate the number of Puerto Ricans or persons of Puerto Rican origin in the census tract which may be divided by the lines of the 17th Congressional District?

A. Yes, this information is for the most part on a block basis, and we have been able to—it is for areas small enough—the areas for which we have this information, now, the enumeration districts are not cut by the Congressional boundaries. They occur on one or the other side of the boundary in the case of these tracts.

[fol. 97] Q. How many census tracts shown on that map are cut by the boundaries of the 17th Congressional District?

A. Sixteen.

Q. And have you been able to obtain—this information you have obtained for the enumeration districts contained in those sixteen cut tracts, is that it?

A. Yes. What we did, all we had to do was obtain the enumeration district figures for one side of the tract. We had the total figures, so we obtained those figures for one side, as this is a very complicated procedure for the Census Bureau, and then we have figures for both sides.

Q. Is this the information that was furnished to you by the Census Bureau?

A. Yes.

Q. Those enumeration districts?

A. Yes, it is.

Mr. Feldman: I offer in evidence a report from the Census Bureau under the seal of the Department of Commerce of the United States signed by the Director, Bureau of the Census.

[fol. 98] Mr. Galt: If your Honor please, I object to this, not on the ground of the authenticity of the figures, which I take it are authentic with the seal, but this is based, even as a hand tally, on an original 25 per cent estimate, or 25 per cent sample, and therefore could not possibly be an accurate indication as to numbers and population of the time referred to. I therefore object to the admission of this exhibit in evidence.

Mr. Feldman: If your Honor please, the entire census of the United States for the last 175 years, for every category broken out of the total population figure, has been prepared on a 25 per cent sample basis. At this stage of the game for the Attorney General to object to the census being taken on a 25 per cent sample basis, I think is a little frivolous.

Mr. Galt: This is in respect to the population density factor. This is not in respect to population figures for the entire district.

Judge Moore: Well, its weight and value and relevancy may be subject to argument, Mr. Galt, but I think we will take the document again, using that judicial expression "for whatever it is worth."

(Plaintiff's Exhibit 5 received in evidence.)

[fol. 99] By Mr. Feldman:

Q. Now, Mr. Limoges, at the time we concluded discussion of Exhibit 4 with Mr. Clemente last Thursday we were talking about the census tracts on the northern boundary of the 17th Congressional District, specifically, the census tract which runs from Fifth Avenue to Park Avenue, from 91st Street to 98th Street, and which, according to the

shading on the exhibit, has a non-white and Puerto Rican population which is between 10 and 15 per cent of the total population of that tract. Now, can you tell us—

A. Excuse me. Is that between—

Q. The tract from Fifth to Park, from 91st to 98th?

A. And what is the shading there?

Q. The shading is—I'm sorry, 5 to 10 per cent.

A. Yes.

Q. You are correct. Now, from the map it would appear that all but one block of that tract is in the 17th Congressional District, the only block being outside being the block from 97th to 98th Street, between Madison and Park Avenues; is that correct?

A. Yes, correct.

Q. Could you tell us what the percentage of non-whites [fol. 100] and Puerto Ricans is in the block of that census tract excluded from the 17th Congressional District?

A. Yes, sir. 32.3 per cent.

Q. So that the percentage of non-whites and Puerto Ricans in the block excluded from the 17th is 32.3 per cent?

A. 3 per cent, yes.

Q. And what is the percentage of non-whites and Puerto Ricans in the balance of that tract, the 12 blocks?

Q. (Continuing) That are included in the 17th Congressional District?

A. 3.5 per cent.

Q. In absolute numbers can you tell us how many non-white and Puerto Ricans are included in the 11 blocks of the tract that are within the district, as opposed to the one block without the district?

A. 286.

Q. Are within the district?

A. Are within the district.

[fol. 101] Q. And how many are without the district in the one block?

A. In the one block, 397.

Q. Now moving to the census tract due east of that, which is from the area of 91st Street to 98th Street, Park Avenue

to Third Avenue, that census tract, according to the shading, has a non-white and Puerto Rican population of between 15 and 20 per cent; is that correct?

A. Yes, correct.

Q. And approximately—well, there are five city blocks within the district and nine city blocks outside of the district; is that correct?

A. That is correct.

Judge Moore: Mr. Feldman, are you talking about a new line drawn in 1961 which divides those particular areas as you now describe them?

Mr. Feldman: I am talking about—

Judge Moore: Or are you talking about a census tract which happens to lie within the old and the new, both?

Mr. Feldman: Well, the census tract may lie within the old and the new, but I am talking about the line that is described by chapter 980, on the basis of the population [fol. 102] shown by the decennial census of 1960, and I am using the decennial 1960 figures which were available to the legislature at the time.

Judge Moore: What I want to know is whether the draftsmen of the line in 1961 drew a new line, saying, and mentally saying, "We will draw it so that we put 32.3 per cent," on your conception of the wrong side of the line, "And we will include 3.5 per cent inside the new 17th"?

Mr. Feldman: Sir, I don't know what was in the minds of the individual legislators who drew the line, and I don't know that it is relevant or material. But I think the purpose and effect of the statute is clear, and it may be that the purpose and effect of the statute drawn in 1952 for these district lines was equally unconstitutional.

Judge Moore: Let me try it again. Is it a new line drawn in '61 that you are now talking about?

Mr. Feldman: Well, if I may consult this overlay, I will tell you quickly. That line I am talking about, sir, is not a new line. That line appeared as a boundary of that district in the 1952 redistricting.

Judge Feinberg: Mr. Feldman, before you take the overlay away, I notice that the first red line in the new 17th [fol. 103] is lower than the old green line.

Mr. Feldman: Yes, sir.

Judge Feinberg: Now, is that something you were focusing on, or are you giving us figures only on the green lines that are coincident with the new red lines?

Mr. Feldman: At the moment, sir, I am only focusing on what is on each side of the red line, the 1961 statute. I intend after that to put the second overlay on and go through what was taken away and what was added.

Judge Feinberg: I see.

By Mr. Feldman:

Q. Now, the next so-called cut tract—

Judge Murphy: Well, he didn't answer the question. You asked him to tell us what the percentage was for the five blocks within the district as opposed to the eleven blocks outside.

Q. What is the percentage of non-white and persons of Puerto origin in the five blocks within the district, as a [fol. 104] percentage of total population of the five blocks, as opposed to the eleven blocks outside, as a percentage of the total population of the eleven blocks?

A. The non-white and Puerto Rican population inside is 7.4; non-white and Puerto Rican population outside is 21.0.

Judge Murphy: And does he have the figures numerically for those two?

Q. Can you give us the numerical figures for the five blocks within and the nine blocks without?

A. Yes. For the five blocks within, 227, for the blocks without, 1,538.

COLLOQUY BETWEEN COURT AND MR. FELDMAN

Judge Moore: Again, Mr. Feldman, because I think I had better ask my questions while we are going along, what is the relationship between the areas which the Census Bureau might choose to use in calculating the particular tracts, and the lines that the Legislature of the State of New

York might choose to draw in those areas for purposes of Congressional apportionment?

Mr. Feldman: The relationship, sir, there is no requirement of an absolute relationship, obviously. The lines of the district are supposed to be drawn, however, by Congressional statute with relation to the population. Population can only be arrived at by the Legislature in consideration of Bureau of the Census figures. Bureau of the Census figures can only be arrived at by the Legislature as a result of an analysis of census tracts. Now, therefore, since the census is a function of redistricting, census tracts must be part of that function, and the purpose and effect of the Legislature—as I say, we can't psycho-analyze each individual legislator—the purpose and effect of the Legislature can in some sense be derived from taking an area, a contiguous area, and giving us a jigsaw line without an apparent reason, when we say that the only reason we can find would be an unconstitutional reason, when you run into sharp differentiation, when you get around to other areas, sir, where you see where they draw the line right through the middle of the census tracts, and you might expect then that there would be some equalization, but, no, the excluded portion is the heavy negro and Puerto Rican portion, the included portion being the low area.

Judge Moore: Well, you are not arguing, are you, Mr. Feldman, that it must be presumed to be unconstitutional for the Legislature to draw its lines along other lines than those of census tract areas picked by the Census Bureau?

Mr. Feldman: No, sir. But this court must derive the [fol. 106] purpose and effect of this statute from all of the facts. One of the facts is that this is an over-represented, under-populated district vis-a-vis the state average and vis-a-vis the three districts adjoining. Therefore, if it is under-populated vis-a-vis the other three districts, I think it is relevant to show what the population adjoining on these boundaries is, so as to see if the Court can determine why it is under-populated and whether the purpose and effect of that under-population is not to fence out the ethnic groups that live on its borders.

Judge Moore: Now let me see if this is your point: Would you say that the entire population of the State of

New York must be taken and divided by the number 41, and that any deviation in population in any Congressional district drawn thereafter is unconstitutional unless the figure is an exact mathematical calculation of the total population divided by 41?

Mr. Feldman: No, sir; I have never said that.*

The Court: What deviation would you say would be permissible within constitutional lines?

Mr. Feldman: I would say that there can be—if there is a rational basis for deviation, a deviation can be constitutional. For instance, if they wanted to preserve the [fol. 107] concept of a census tract, or a crosstown street, which is an oft traveled street, such as they did on the West Side, using 86th Street, the fact that the population of one district is two or three or four or ten thousand larger or smaller than its adjoining district, I don't think would be unconstitutional, if there is some rational basis. If, for instance, the state average being 409,000 persons for a Congressional district, they took a county with 435,000 people, and said "Rather than put that county partly in one Congressional district, with one corner in another, we will make this district 435,000," I don't think that would be unconstitutional. There is some rational conception there. But where they take one self-contained island, to which they have apportioned four Congressmen, with a population of 1,698,000, or an average of 420 some-odd, or 430, I guess, per district, and they end up with the kind of deviation they have ended up with, namely, this district being 15.4 per cent smaller than this adjoining district, and 12 per cent smaller than that one, and 14 per cent smaller than that one, and the district lines are drawn in an irrational jigsaw pattern, and the effect is to screen in the bulk of the whites and screen out the bulk of the non-whites and Puerto Ricans, [fol. 108] that, I say, combined is unconstitutional, and the purpose and effect of it would appear to have been to create one lily white district.

We will show later what the alternatives were and the effect that it would have had on the racial composition of these districts. We have only thought of simple alternatives that I will suggest to the court, not for purposes of its

mandate, but only to show what the rational mind could easily conceive of in dividing the Island of Manhattan.

By Mr. Feldman:

Q. Now, Mr. Limoges, we come down to the southern border here, which includes Stuyvesant Town, and the next cut tract; so to speak, we reach—

A. East 3rd Street.

Q. —is on East 3rd Street. It is this district here, running from—well, from Great Jones Street south to East Houston Street, between the Bowery and West Broadway; is that it?

A. The tract itself runs from East 4th, East 4th down to East Houston, and the Congressional line runs along—

Q. Great Jones.

A. —Great Jones.

[fol. 109] Q. All right. So that that tract is cut.

A. (Continuing) And West 3rd.

Q. Now that cut tract shows on the map and shaded to indicate a percentage of non-whites and persons of Puerto Rican origin of between 10 and 15 per cent; is that correct?

A. Yes.

Q. Would you tell us what the percentage of non-whites and persons of Puerto Rican origin is on each side of the tract?

A. Yes. In the 17th Congressional District 8.2 per cent on the other side of the line; outside, 12.6 per cent.

Q. And in absolute numbers?

A. Absolute numbers inside is 12; outside, 434.

Q. But the bulk of the tract is outside, is it not?

A. Yes.

Q. Now let's come up to the western border of the district, and the census tract runs from Sixth Avenue, Avenue of the Americas, to Eighth Avenue, from 14th Street to 18th Street.

Judge Feinberg: Mr. Feldman, excuse me for interrupt-
[fol. 110] ing you. Did Mr. Limoges say that the figures on the last cut tract was 82.2 per cent in and 12.6 per cent out, and did he then say that the absolute figures were 12 and 434?

The Witness: Yes, sir. The percentages we were giving are of the part of the tract on one side of the Congressional district line, the part on the other. So it is 12 for the portion of the tract within the 17th Congressional District, it is 12 Puerto Ricans out of a total population of 147.

Judge Feinberg: I see.

Q. Now, Mr. Limoges, talking about the tract on the western border, that runs from Sixth Avenue or Avenue of the Americas to Eighth Avenue, from 14th Street to 18th Street, and that tract consists of eight city blocks, of which four city blocks is inside the 17th and four city blocks is outside the 17th; is that correct?

A. Yes, it is correct.

Q. Now that tract you have shaded on the map is between 15 and 20 per cent non-whites and Puerto-Ricans. Would you tell us what the percentage is inside the tract and outside of the tract—of the 17th district? Excuse me?

A. For the area within the 17th Congressional District, [fol. 110a] 14.6; outside, 20.6.

Q. And in absolute numbers, sir?

A. 388.

[fol. 111] Q. Inside the district?

A. Inside, and 1,026 outside.

Q. Now, the next census tract north of that runs again between Sixth Avenue and Eighth Avenue, from 18th Street to 22nd Street, of which four blocks is in the district and four outside, which you have shaded as indicating between 20 and 35 per cent.

A. Yes.

Q. Non-white and Puerto Rican. Could you tell us what the percentages are of the total population inside the 17th District as against the population outside?

A. Inside of the 17th, 23.4 per cent; outside, 26.1.

Q. And in absolute numbers, sir?

A. 192.

Q. Inside.

A. Inside; 1,343 outside.

Q. For the census tract immediately north, running from 22nd Street to 26th Street, between Sixth and Eighth Avenues, again which you have shaded as indicating between 20 and 35 per cent for the tract.

A. Correct.

Q. Could you tell us what the percentages are inside the 17th District as against the percentage of the population outside?

A. Inside the 17th, 9.3 per cent; outside, 21.7 per cent.

Q. And in absolute numbers, sir?

A. Inside is 49, and the figure outside, 746.

Q. Now, in the census tract immediately north of that, which is shaded 50 to 75 per cent—

Judge Murphy: What streets are they?

Q. That runs from Sixth Avenue to Eighth Avenue, from 26th Street to 30th Street; would you tell us what the percentages are inside and outside?

A. Inside is 71.2 per cent; outside is 48.7 per cent.

Q. In absolute numbers, sir?

A. Absolute numbers, inside the 17th, 241; outside, 503.

Q. What is the total population of the portion inside?

A. The portion inside is quite small, 339.

Q. Now, the next split census tract shows less than 5 per cent non-white and Puerto Rican; what is the total population of that tract?

A. Of the tract, 333.

Q. And that is the area immediately around Penn Station and Macy's, running from Sixth Avenue to Eighth Avenue, from 30th Street to 34th Street, is that correct?

A. Yes, correct.

Q. Now, we next split—oh, excuse me. You then have an area which is east of the 17th boundary, where you don't have split tract, but you have shadings which indicate a range of non-whites and Puerto Ricans of from 20 to 35 per cent in the lower two tracts, going down to 15 to 20 per cent in the next two tracts, and 10 to 15 per cent in the third tract.

Could you tell us what the total population is of each of those five tracts inside?

Judge Murphy: That goes from what street to what street?

Mr. Feldman: Running from 30th—the two tracts which are 20 to 35 per cent run from 34th Street to 42nd Street,

between Sixth and Eighth Avenues, and the shading between 15 and 20 per cent runs from Sixth to Eighth Avenue, 42nd to 50th.

The shading, 10 to 15 per cent, from 50th to 54th, between Sixth and Eighth. There are five census tracts involved.

A. Right. Shall I give the information on the entire series?

[fol. 114] Q. Yes, why don't you?

A. What I will do, I will give the tract number and then its—

Q. Tract number won't mean anything to us, so tell us whether it is the one running from 34th to 42nd, or whatever it is.

A. Fine. For the tract between 34th Street and 38th Street, the total population is 308.

Q. And for the tract between 38th and 42nd?

A. 450.

Q. And for tract between 42nd and 46th—each of these tracts is eight square blocks, are they not?

A. Yes, sir.

Q. And the tract between 42nd to 46th?

A. 2,337.

Q. And from 46th to 50th?

A. 3,302.

Q. And 50th to 54th?

A. 1,573.

Q. Now, the next split tract is in the area from 54th Street to 58th Street, from Eighth Avenue to Amsterdam Avenue, is that correct?

Judge Murphy: May I interrupt? I don't know what we are going to do with these figures. The total population you [fol. 115] gave us of these four different tracts come to so much.

Mr. Feldman: Well, these are the areas included in the district which are not split, and the shadings on the exhibit reflect the percentages for each of those tracts.

Judge Murphy: I appreciate that. You weren't going to show what the percentages were on the other side?

Mr. Feldman: There is no other side. They are only contained within the district. The line doesn't split the tract.

Judge Murphy: I see. Thank you.

Q. Now, in the next split tract, between Amsterdam Avenue and Eighth Avenue, from 54th to 58th Street, which is shaded 10 to 15 percent, would you tell us—shaded 10 to 15 per cent non-whites and persons of Puerto Rican origin, can you tell us what the percentage is on each side of the district line?

A. Inside the 17th, 9.3 per cent; outside, 19.8.

Q. And in absolute numbers?

A. 449 inside; 901 outside.

Q. Nine hundred and what?

A. 901.

Judge Feinberg: What was the first figure for inside, [fol. 116] absolute?

The Witness: 449.

Q. Now, the next census tract that is split runs from 58th Street to 62nd Street, from Central Park West to Amsterdam Avenue, in those eight blocks you have shaded as indicating a non-white and Puerto Rican population of less than 5 per cent.

Would you tell us what the percentage is inside the district and outside the district?

A. Inside the district, 3.3 percent; outside, 4.2 per cent.

Q. And in absolute numbers?

A. 64 inside and 9 outside.

Q. And the next split tract runs from 62nd to 66th Streets, from Central Park West to Amsterdam Avenue, and then you have shaded as indicating between 15 and 20 per cent non-whites and Puerto Ricans. What are the percentages inside and outside there?

A. Inside is 16.6; outside, 7.8.

Q. And in absolute numbers?

A. 783 as opposed to 7.

Q. 783 inside?

A. Inside.

Q. As opposed to 7 outside?

[fol. 117] A. Yes.

Q. Now, the next tract is from 66th to 70th Street, Central Park West to Amsterdam Avenue, which is indicated by your map shaded as between 10 and 15 per cent non-white and Puerto Ricans. Would you tell us what percentages inside the district and outside the district are there?

A. Inside the district, 7.7 per cent; outside, 17.2 per cent.

Q. And in absolute numbers?

A. 352 inside and 716 outside.

Q. Now, the next is the last split tract, which runs from 70th Street to 74th Street, from Central Park West to Amsterdam Avenue. Again it is eight square blocks, but this time only three of the eight are inside of the district, is that correct?

A. Yes.

Q. Could you tell us what the percentages are there? You have it shaded on the map as between 10 and 15 per cent.

A. Inside the 17th, 7.7 per cent; outside, 12.5 per cent.

Q. And in absolute numbers?

A. 403 inside; 1,005 outside.

[fol. 118] Q. Now, I also notice that there is one census tract within the 17th Congressional District, the lower end, running along the Bowery and Fourth Avenue on one side, and Third Avenue on the other, to 14th Street, from Cooper Square north of 14th Street, which you have shaded as 50 to 75 per cent non-white and Puerto Rican. Could you tell us what the total population is of that census tract?

A. Actually, the tract population isn't quite that high. The total tract, 35.9 per cent. It is under 50.

Q. I see.

A. They have there the total tract population is 1,062.

Q. 1,062?

A. On the entire tract.

Q. Would you say from your view of census tracts that this is one of the smallest tracts, in terms of population?

A. Yes, yes, very small.

Q. I'm sorry. You are right. The shading I should have referred to is between 35 and 50 per cent.

Judge Feinberg: Do I understand, Mr. Feldman, that that entire census tract is in the 17th?

[fol. 119] Mr. Feldman: That entire census tract is in the

17th. It is the one census tract in the 17th, the entire census tract within the 17th with a high percentage, or with a percentage of 35 per cent of non-whites and Puerto Ricans, but it is one of the smallest census tracts in New York, with total population of approximately 1,000 persons. (S)

Q. Now, Mr. Limoges, I ask if you can identify this overlay, which I have just placed upon Plaintiff's Exhibits 4 and 4-A, which contains certain green striped lines?

A. Yes. That is the boundary of the old 17th Congressional District before the reapportionment.

Q. The old Congressional District prior to the last redistricting in 1961?

A. That's right.

Q. Was that prepared under your supervision and direction?

A. Yes, it was.

Mr. Feldman: I offer this overlay as Plaintiff's Exhibit 4-B.

[fol. 120] Judge Moore: Yes.

(Plaintiff's Exhibit 4-B received in evidence.)

Mr. Feldman: For the convenience of the Court, sir, we have made photo reductions of Exhibit 4, 4-A and 4-B as a composite, as it would now appear, namely, the shaded areas of the map showing the lines of the old 17th and the lines of the new 17th. So as to make it somewhat easier for the court to follow, I would like to hand those up. And I think we discussed last time leave to substitute for the record these photo reductions, and making the originals available in the Clerk's office.

[fol. 121] By Mr. Feldman:

Q. Now, Mr. Limoges, do you know what the total population was of the old 17th?

Judge Murphy: When?

Mr. Feldman: Prior to the 1961 redistricting.

Judge Murphy: In 1960?

Mr. Feldman: In 1960, yes, sir, at the time of the redistricting in 1961, actually by 1961 statute, sir.

Judge Moore: 1952 or '60?

Mr. Feldman: No, I ask what the population of the 17th was prior to the drawing of lines by chapter 980, which would be the period from 1952 through the enactment of 980 in 1961.

Judge Moore: But figuring in terms of what date?

[fol. 122] Mr. Feldman: Of the 1960 census.

Mr. Offner: 1950 census.

Mr. Feldman: In terms of the 1960 census, is what I am asking at this point.

The Witness: I have the figures. It will take me a minute to find them.

A. Yes. In the old 17th Congressional District, 1960 census, total population 260,235, 260,235.

[fol. 123] Q. And the total population of the new 17th, we have learned previously, is 382,000; is that correct? So that they have added approximately 122,000 persons. Now, do these areas that were added, are they represented by the area between the red line and the green lines on Exhibit 4-B as the overlays 4-A and 4?

A. Yes, sir; right, it is.

Q. Now, have you determined the total population which was added to the old 17th in the area north of 59th Street, between 59th and 89th Street?

[fol. 124] A. 101,716.

Q. And what is the percentage of that 101,000 which is non-white or of Puerto Rican origin?

Mr. Galt: If your Honor please, I will object to that figure unless he indicates how he arrived at it, because that is not a census figure, unless he has developed it from census material.

Q. How did you arrive at that figure, Mr. Limoges?

A. This was determined from the census information, from the tract statistics, tract and block statistics.

Q. By adding up the total population shown by those

tracts and blocks in the census publications; is that correct?

A. Yes.

Q. Now, what is the percentage of that 101,000 which is non-white and Puerto Rican origin?

A. 2.7 per cent.

Q. Can you tell us what the number is in absolute numbers?

A. 2,749.

Q. Now, there was an area added on the southern boundary, what we have known as Stuyvesant Town, running from 14th Street to 20th Street, from First Avenue to the river; have you determined what the total population of [fol. 125] that area is according to the census information?

A. Yes. The total population is 22,405.

Q. And what is the percentage of non-whites and Puerto Ricans in that area added to the 17th?

A. 0.5 per cent.

Q. And in absolute numbers how many whites, non-whites and persons of Puerto Rican origin?

A. 105.

Q. Those were the only two areas that were added to the 17th; is that true?

A. Right.

Q. And there was one area dropped from the 17th, and that is the area from 98th Street to 100th Street, from Fifth Avenue to Madison; is that correct?

A. Yes, right.

[fol. 126] Q. Mr. Limoges, have you made any calculations based upon census tracts as to where the northern boundary of this district, the 17th Congressional District, would have to go if it were to be approximately equal in population to the other districts in Manhattan?

Mr. Galt: I strenuously object to that question, your Honor. It is obviously improper. And if the Court wishes the reasons, I would be glad to elaborate. It seems so improper on its face that I need not elaborate.

Judge Moore: I don't think we need the reasons, Mr. Galt.

You can draw a line anywhere, Mr. Feldman, to bring in any specific number of people. I don't think that Mr. Limoges has the only answer to that calculation.

Mr. Feldman: Well, sir; I merely asked where a straight line would have to go to the northern boundary to make this district approximately equal to 420,000 people.

Judge Moore: But this is an assumption that you must have a northern boundary, you must have a straight line [fol. 127] and you must have the same number of people. I think we can say that if you need to bring 382,000 people up to 409,000, you need to add 27,000.

Mr. Feldman: Well, it would be more than 409,000 in Manhattan. The average in Manhattan is a lot more than 409. It is more than 430,000.

Judge Moore: You see, this is your thesis, you can pick up by drawing straight lines anywhere on any of the north, east, south or west boundaries, if that is the goal that must be obtained.

Mr. Feldman: Exactly, sir, and I want to go through it and show that if this district brought anywhere near to one-fourth of the population of Manhattan Island, I want to show how many people it would add if it were done on the north or the south or the west, or a combination, and what the ethnic compositions of those persons would be, and what effect it would have on the total redistribution of ethnic groups within the island, within the four Congressional Districts, and I would therefore to make an offer of proof along that line.

Judge Moore: I don't see any reason why our minds are going to be greatly disturbed by your hypotheses, so I suggest, Mr. Galt, that we go ahead and find out what this witness has. Quite possibly we will all learn something [fol. 128] from it. But it is naturally not binding upon you nor the court nor the Legislature of the State of New York.

Mr. Galt: Of course, your Honor, it is not, but I think this could lead us into so much second guessing of the Legislature, so many permutations and combinations, aside from the many other objections I can conceive of, and which I don't think it is necessary to spread on the record,

that I will simply register my strenuous objection again and let it go at that.

Judge Murphy: Let me ask, are we going to learn anything about what the Legislature had in mind at all?

Mr. Galt: As a matter of fact, if your Honor please, I think that despite the disclaimers—

Judge Murphy: No, my question is, are we going to learn what the Legislature had in mind?

Mr. Galt: I don't know what the proof is going to be. Obviously it is addressed to legislative intent.

Judge Murphy: I will withdraw the question.

Judge Moore: Well, despite, as you say, you want to lead us, don't lead us into too many green pastures, because your Exhibit 4-B, the green overlay, gives us a fair [fol. 129] idea. But go ahead with whatever you have in mind.

Mr. Feldman: 4-B gives us a fair idea of what was added and what was subtracted between the old statute and the new. I just want to give the Court some notation of the number of non-whites and Puerto Ricans that would have been added to this district had they made any approach to equalization of the districts.

Judge Moore: Well, I still am baffled, and I assume you will address yourself to this eventually, as to whether you are speaking about equalization of Congressional Districts into numbers of persons in the Island of Manhattan, since we now have four districts, or whether you think that there must be a scattering of racial groups in each of the four districts, with respect to certain percentages, and I still am not clear on that. But the best way to clear it up is to let Mr. Limoges go ahead with his speculations and hypotheses, and then it will all be picked up in some kind of an argument later on.

Mr. Feldman: All right, sir.

By Mr. Feldman:

Q. Now, have you computed where a northern boundary would go to increase the size of this district, so as to [fol. 130] approximate one-quarter of the total population of New York County?

A. Yes, I have. It might be easier if I could use the map.

Judge Moore: Yes, certainly.

(Witness leaves stand and goes to map.)

A. (Continuing) I have done these calculations for several boundary alterations. The first assumption in all of these; since we are altering boundaries, is to straighten out the western boundary and have that run down Central Park West and Eighth Avenue, and that entails just dropping these blocks and adding these blocks.

Q. For the sake of the record you mean dropping the blocks from 72nd to 54th, between Central Park, 73rd to 54th Street, between Central Park West and Columbus, and adding the blocks from 14th to 34th, between Seventh and Eighth, so as to provide a straight western boundary.

Judge Moore: I take it that you are redrafting, if not for us, at least for the Legislature, a new 17th, as you would have it, now, and Mr. Limoges, have studied permutations and combinations, there are several ways in which it could be done, and you now want him to tell us those several ways.

[fol. 131] Mr. Feldman: I am not going into those several ways yet.

Q. Mr. Limoges, the straightening of the western boundary by dropping one area and adding another, would the population you drop be roughly equivalent to the population you added?

Judge Moore: Yes, but tell us along what street, because we all know Manhattan. What western boundary has he selected with respect to the figures that he now proposes to give us?

Mr. Feldman: All right.

The Witness: That would be Eighth Avenue.

Judge Moore: Eighth Avenue?

The Witness: Yes, sir.

The Court: Starting at what southerly street and going up how high?

The Witness: Well, let's take it from the north, starting at 110th present northerly.

The Court: All right, you are a southerly operator. You start at the north then.

The Witness: And coming all the way down to, well, past 14th, to the end of Eighth Avenue, it would be about Bank Street, and then going on through.

Q. Exactly where the lines are now on the south and [fol. 132] on the east?

A. Yes, sir.

Judge Moore: Where do you start at, 110th Street?

The Witness: Yes, right there, just run it right there.

Judge Moore: And you come down Central Park West all the way straight?

The Witness: Yes, to here.

Judge Moore: Central Park West and Eighth Avenue south to its terminus at, say, at Bank?

The Witness: At 14th Street.

Judge Moore: At 14th Street.

The Witness: The present boundary.

A. (Continuing) So one is—that is the first change. The second change deals with—the second assumption is, well, what would have happened if Stuyvesant Town had not been added? And so there we also eliminate the boundary of Stuyvesant Town and run this southern, the southern boundary along 19th Street, over to First Avenue, and then north to 20th Street, and east on 20th to the river. So then it entails dropping out this area here.

Q. You mean using the same boundary as the old 17th? [fol. 133] A. Right, correct, correct.

Judge Moore: Now, if you are a straight line operator, why didn't you take the southern boundary and run it right over to the East River?

The Witness: Well, that we have done in another combination.

Mr. Feldman: That is another hypothesis, sir. We will get to that.

The Witness: This is just the beginning of the north. And then what we have done, we have just—what I have done, I have just added the sections to the north, I have added a single block, here the remainder.

Q. You have straightened out the line which includes whatever it is.

Judge Moore: I am sorry to interrupt so much, but while we are on the west side of Manhattan, what population effect, if any, had you calculated this Eighth Avenue straight line would make? Because as I observe it, certain areas are out and certain areas would come in.

The Witness: Involve the dropping of about 19,000 people.

Judge Moore: Out of the 17th?

The Witness: Out of the 17th.

[fol. 133a] Judge Moore: And do you figure that in terms of the two races that you are interested in or commenting upon? 19,000 people would go out under your—

Mr. Feldman: Is that correct, Mr. Limoges, 19,000 out?

The Witness: Yes, that is.

[fol. 134] Judge Feinberg: Now, the 19,000 out, have you figured out their racial characteristics?

The Witness: Well, let me see, that's 1,755—I am sorry. I am sorry, the total white, Puerto Rican and non-white, 2,830 people—2,830 non-white and Puerto Rican in this area.

Judge Feinberg: (That would go out?)

The Witness: Yes.

Judge Feinberg: And how many would come in?

The Witness: 2,888. It's quite close. It doesn't affect that too much.

Judge Feinberg: So the mere effect of straightening out the line on the West Side would be to drop 19,000 people but not change the composition of the non-white and Puerto Ricans in the 17th?

The Witness: Yes, true. That is the case.

And then what I did, I added a territory on the north, going this way, and to make it as accurate as possible, I did it by census tracts: That's because we have the figures for Puerto Rican population available only on a tract basis, except for the special thing which we did, asking for a hand tally. So that will result in a boundary which is slightly crooked, it is not exactly a straight line, but the [fol. 135] same—it would be just about the same if you did have a straight line.

Finally, by adding tracts until I reached a total Congressional district population of 425,014—

Judge Moore: That is what you are aiming for as an ideal 17th, 425,000 people?

The Witness: That is the way I stopped the calculations because that's just about one-fourth of the total population. Just so there would be some place to stop.

And that would result in a boundary running from the west, starting at Fifth Avenue—yes, starting at Fifth Avenue and 106th Street, running east to Park Avenue, south to 105th Street, east to Third Avenue—south—sorry, north to 109th Street, and then east to the river.

So that if I could add a tape for a moment to show you how that would look.

Judge Feinberg: Does this calculation assume that the boundary line on the west has been straightened out or left alone?

The Witness: It has been straightened out, all the hypothetical districts straightened out.

Judge Feinberg: So that the 425,000 people you have stopped at includes or makes up more than enough for [fol. 136] the 19,000 people that were lost, is that correct?

The Witness: I subtracted that 19,000 from the present total population. I subtracted the population of Stuyvesant Town from the total population and then added—

Judge Feinberg: To the 425,000?

The Witness: That's right. Approximately the boundary would run roughly in this—(adding tape) this is rather crude but there is the general idea. It would bring it up that far north. At that point, the total white Puerto Rican and non-white population would be 59,486 as opposed to the population of the non-white and Puerto Rican population of the present 17th, 19,652.

By Mr. Feldman:

Q. Now, also assuming you are straightening out on the western boundary, have you also made a similar calculation which, assuming the continuation of the northern boundary of the new 17th, where the southern boundary would go if the district were to be enlarged to roughly approximately one-quarter of the population from that?

A. Let me look at my other figures on that.

Q. To make myself clear, Mr. Limoges, I mean assuming no change in the northern boundary of the 17th described [fol. 137] in the statute, is that correct? Are we speaking of the same assumption?

A. Not quite, no.

Q. Why don't you tell us what the assumptions would be and where the southern boundary would come?

Judge Moore: First, have you figured out how many people would be included in that new northerly area between your 10 scotch tape, the red line? You have given us figures with respect to Puerto Rican and non-white, but how many persons would be added?

The Witness: Well, let me see, do you mean after we straightened the boundary?

Judge Feinberg: That he eliminated 19,000.

The Witness: Yes.

Judge Moore: As I understood it, you said that that new area which you would propose for the northern portion would include 59,000 Puerto Ricans and non-whites and I am wondering how many other persons would be in that territory as recorded in this 1960 census.

Judge Murphy: I don't think that was the figure. I thought the number was for the whole district.

The Witness: That's right.

Judge Moore: 39,000 persons added.

[fol. 138] Judge Murphy: No, there were 59,000 non-whites in the present Congressional district; and if he—no, there were 19,000-some-odd now in the present, and if we adopted his change, it would bring the non-whites and Puerto Ricans to 59,000 something.

The Witness: Yes.

Judge Moore: That is what I gathered, but I am assuming, however, that that doesn't mean that this 40,000 extra are entirely within that area and that there are no persons other than Puerto Ricans and non-whites in that geographic section.

The Witness: No, after all the eliminations, after we eliminated this area and this area—

Judge Feinberg: How much did you eliminate by eliminating the second area.

Mr. Feldman: Stuyvesant Town.

The Witness: 14,205.

Judge Feinberg: You have eliminated 19,000 and 22,000?

The Witness: Yes.

Judge Feinberg: Not only that but enough to get up to 24,000, isn't that the answer to Judge Moore's question as to how many you have added?

The Witness: The remainder of the present population [fol. 139] of the new 17th, and these northern tracts.

By Mr. Feldman:

Q. To get to a total of 425,000?

A. Right.

Q. So you dropped 19,000 and 22,000 approximately, or 41,000, and you have added that 41,000 plus the 30,000-some-odd to go from 382,000 to 424,000.

Judge Feinberg: So you added in that tract some 70,000 or 75,000 people; that is what is represented by the population between the brown tape and the red tape, isn't that correct?

The Witness: Yes.

Judge Feinberg: Maybe even more, 84,000?

The Witness: Yes.

Q. Mr. Limoges, before we move from discussion of the southern boundary, have you had a chance during the recess to compute the total population of the block dropped from the old 17th in the redistricting, namely, from 98th Street to 99th Street, I guess it is?

A. Yes.

Q. Between Fifth and Madison?

[fol. 140] A. Two-thirds of a plot, it's a new development, and so it runs between Fifth and Madison from 98th to what would be 100th Street.

Q. 98th to 100th from Fifth to Madison?

A. Yes, right.

Q. Is there a new housing project that was built there in the last ten years, is that it?

A. I believe the street has been eliminated, that is, 99th

Street and 100th Street has been eliminated, so I presume it's a new kind of project.

Q. Could you tell us what the total population in that corner was from 98th to 100th and from Fifth to Madison?

A. 806.

Q. And what was the percentage of that population—what percentage of that population is non-white and Puerto Rican origin?

A. 44.5 per cent.

Q. Now, Mr. Limoges, do you also do calculations as to where a boundary line would go on the south of the 17th, the new 17th, assuming a straightening of the western line as you previously described, making the district equal to approximately one-quarter of the population of New York County?

[fol. 141] A. Yes.

Q. Would you tell us about that, please?

A. For the sake of convenience, this was done before we had the enumeration district figures, so therefore to be able to use the tract totals for the Puerto Rican population I also straightened these lines here (indicating).

I extended the boundary along 98th Street from its present terminus at Madison Avenue over to Third Avenue and then south on Third to where it meets the present boundary.

Q. How many people were added by that?

A. 8,551.

Judge Feinberg: Added by what?

Q. Added by taking the complete census tract before proceeding to calculating location of a southern boundary by bringing the northern boundary that cuts this census tract between Park and Third Avenues, over to Third Avenue, and run it straight along 98th Street, is that what you said, Mr. Limoges?

A. Yes. All right, and then once that was done, I started to add tracts on the south. Of course, in this case Stuyvesant Town remained in the 17th, that was not removed.

[fol. 142] I added tracts until I got up to a total population of 427,351, and that new district would have a total of white Puerto Rican and non-white population of 36,134, or

8.5 per cent. And I could also use the tape to—that results in a new boundary running along 9th Street from Third Avenue to Avenue D (applying black tape to map), and then south on Avenue D to East 6th Street, and then east on East 6th Street to the river.

Q. So as not to cut that one census tract?

A. Yes, that's right. Something like this. This is the area added (indicating) and it results in a straighter southern boundary than at present.

Q. And that would have given a total population to the 17th of what, sir?

A. 427,351.

Q. With a non-white and Puerto Rican population of what?

A. 36,134.

Q. That as opposed to the present 19,000-some-odd?

A. Right.

Q. Now, Mr. Limoges, you also calculated some other hypothetical alternative without reference to the present district line, did you not?

A. Yes, I did.

[fol. 143] Q. And were those done by attempting to merely divide Manhattan into four equal parts by point of view of population?

A. Right.

Q. And having the line follow census tract confirmation merely for the sake of statistical convenience, is that correct?

A. Yes.

Judge Feinberg: Before you go to that, would you leave the other map out for a moment?

Mr. Feldman: Yes.

Judge Feinberg: I have one question:

On the southern portion of the new 17th where Stuyvesant Town was included, just to the left of that there is an area that was excluded.

(Witness indicates.)

Judge Feinberg: That's right. Could you tell me what the population of that square is and what the ethnic composition is?

The Witness: I have to check my figures.

Judge Feinberg: Would you do that, please.

Mr. Feldman: That, Judge Feinberg, as I understand your question, is the area bounded by 14th Street on the south, 20th Street on the north, Third Avenue on the west [fol. 144] and First Avenue on the east.

Mr. Galt: That would be 19th on the north.

Mr. Feldman: 19th on the north, that is correct.

The Witness: The tract has a total population of 6,862, a total white Puerto Rican and non-white population of 837, or a non-white and Puerto Rican percentage of 12.2 per cent.

Q. Now, would you tell me what this chart marked—chart—3-A, B, C, represents, Mr. Limoges?

A. Well, these are three schemes for creating four Congressional districts in Manhattan, with relatively equal total populations and trying to make the boundary lines and the pattern as simple as possible.

Q. Were these maps prepared under your direction and supervision?

A. Yes, they were.

Q. And would you explain them to us, please?

Mr. Feldman: For the sake of convenience of the Court to follow, I have photo reductions.

A. The statistics for these are based on whole census tracts to avoid splitting tracts, and therefore the boundaries are slightly irregular, but this was to get a total population [fol. 145] as near to 425,000 as possible, and not cut a tract.

Scheme A envisions basically a southern and a northern division and an East Side and West Side district. The total population figures for these districts are as follows:

Southern, 421,284; eastern, 429,069; the western, 424,269; and the northern, 423,659.

Q. And what would have been the division as between white and non-white Puerto Ricans in those four districts had it been divided that way, Mr. Limoges?

A. Well, then, for the white Puerto Rican and non-white percentage of each district's population—

Judge Moore: So that we can mark these physically on the reproductions you have given to us, would you mind repeating the figures and we will key them in here on the map as you give them.

Q. We are now speaking about the one labeled "A," sir.

Judge Moore: A, southern.

A. Southern, 421,284. Eastern, 429,069. Western, 424,269. And northern, 423,659.

[fol. 146] A. (Continuing) Now, for the white Puerto Rican and non-white percentage, in each of these districts; southern, 22.3; eastern 32.2; western, 37.1; northern, 59.1.

Mr. Feldman: Would you like those repeated?

Judge Moore: These are white and non-white Puerto Rican!

Mr. Feldman: Puerto Rican and non-white, or, as Mr. Limoges called it, white Puerto Rican and non-white.

Q. Would you repeat those percentages again?

A. Southern, 23.3; eastern, 32.2; western 37.1; and northern, 59.1.

Q. What is the chart marked "B"?

A. Well, B envisages three east-west lines. You have the same southern and northern districts as in the first, but the—

Q. So the total population and non-white Puerto Rican percentages for the southern and northern would be the same as you previously read?

A. Correct. And then there is basically—

Q. A middle south and middle north?

A. Yes, a south central district wrapped this way around Central Park and a north central.

[fol. 147] Q. And what would have been—what would be the population percentage figures for those?

A. Well, for the south central, total population, 419,129; Puerto Rican and non-white percentage, 9.5. And for the north central, total population, 434,209, non-white and Puerto Rican percentage, 58.9

Q. Would you explain the third chart marked "C," please?

A. The third chart was an attempt to divide Manhattan into—or trying to impose roughly a plus sign onto Manhattan, working from the center out, so it has a north-south boundary running from 14th Street up to Harlem River, and then these two boundaries to complete it (indicating).

So here we call this a southeast-southwest, northeast-northwest.

For the southeast, total population, 430,655; non-white and Puerto Rican percentage 22.4.

The southwest, 418,630; non-white and Puerto Rican, 31.6 per cent.

Northeast, 422,156; non-white and Puerto Rican, percentage 43.0.

Northwest, total population, 426,840; non-white and Puerto Rican percentage, 53.8.

[fol. 148] These are the three schemes for hypothetical districts.

Mr. Feldman: If your Honors please, I would like now to offer this chart the witness has referred to in evidence.

Judge Moore: We will take it for whatever point it may have.

(Chart marked Plaintiffs' Exhibit 6 in evidence.)

Cross examination.

By Mr. Galt:

Q. Mr. Limoges, on Plaintiffs' Exhibit, I believe it is 4, 4-A and 4-B, with the overlay—for "B" I believe you can [fol. 149] see that from there, can't you, Mr. Limoges?

A. Yes.

Q. See this little block up here on the northern boundary of the 17th—I guess that would be the northwest boundary. Red tape is the new Congressional line, is that correct?

A. Yes.

Q. And the green the old?

A. Yes.

Q. Do you know what is in that block or set of blocks?

A. I don't know what was there at the time of this census, no.

Q. Well, did you ever look at an ordinary map like Hagstrom's map of New York City? If you didn't physically visit the place. Do you know what is in there?

A. It could be some kind of institution, couldn't it?

Q. Would it refresh your recollection if I told you that Mount Sinai Hospital was in there?

A. (No answer.)

Q. And would you agree that that was located in there?

A. I will accept your word for that, yes.

[fol. 150] Q. And that Mount Sinai Hospital comes down to what is now the red boundary line, and I believe it is 98th Street?

A. Yes, I will accept that.

Q. Now, from your description before, you travel along—

Judge Murphy: I am a little curious. Shall we take your statement as a fact that it is Mount Sinai Hospital?

Mr. Galt: I think the witness has agreed to this and I submit to the Court it is Mount Sinai Hospital, and—

Judge Murphy: He also said there were 806 people living there.

Mr. Galt: That is the reason for my question. They may be residents of a hospital, but there is an institution there, and that obviously would account for the change of the line.

The Witness: Well, sir, I don't quite get your point, I mean, it's an institution, and the people that are residents were counted.

Q. I am not saying they were or were not counted; I only asked you if that was a hospital in there.

A. Yes, yes, I will take that.

[fol. 151] Judge Moore: In your theory, I suppose, Mr. Galt, that they hope not to be there long enough to acquire a legitimate voting residence?

Mr. Galt: I would say there were several theories there; obviously there would be a certain amount of transiency

not only on the part of patients but on the part of personnel as residents, nurses, et cetera. And the explanation for the removal of that line is almost obvious when you have a natural situation like a hospital at that point.

The explanations of legislative intent are necessary, although that was abjured expressly by counsel, nevertheless it seems to me that the intent and purport of the testimony was to explore, if it possibly could be explored, a very nebulous concept of legislative intent.

Judge Feinberg: Mr. Galt, I was curious about that block, too. Why is it more natural to put the hospital in one district rather than the other?

Mr. Galt: It may not be natural to put it in one district or another. I couldn't tell you, and I wouldn't profess to tell you any sound or accurate reason why, but obviously it makes sense to put the line on one side or another of this [fol. 152] hospital property, which is probably—I don't know for certain—but probably expanding. I believe they did expand a bit south, I am not sure of where or why, but I believe that did happen in the ten years between the legislative sessions on this.

By Mr. Galt:

Q. Now, when you explored the north boundary line of the 17th as formerly and as now it would be constituted, were you aware of the fact of the composition of population in this area here (indicating) right north of the red line which will be the new 17th Congressional District?

A. Yes, sir.

Q. That is a pretty long section, isn't it? It goes from, I believe this is Third Avenue, right, Mr. Limoges, all the way over to the river, over to Schuyler Park, to be more accurate—no, Carl Schurz Park, which is on the river's edge, it goes all the way over, does it not?

A. Yes, it does.

Q. Now, there are a number of blocks north of that red line, in this entire area over here from Third Avenue over to the easternmost boundary of the 17th.

In other words, it is a sort of a horseshoe in here, right? [fol. 153] A. Yes, correct.

Q. What is the composition of this block—I think it's—I am not sure but it looks like 95th Street.

A. 94th.

Q. You see where I am pointing, don't you?

A. That goes up to 94th Street, sir.

Q. 94th?

A. Yes.

Q. And that goes from here over, below 89th where the district line is, on the southern side at least of 89th.

A. Right.

Q. What is the racial composition from the standpoint of this density chart that you have been using?

A. There are two tracts there, both under—

Q. I am not interested in the tracts. I am just interested in this portion that I have outlined to you, right in here (indicating).

A. That entire area is under 5 per cent non-white and Puerto Rican.

Q. And I believe, if I understood correctly, that Judge Feinberg called your attention previously to this area here (indicating) down here at the south, opposite, rather, I [fol. 154] should say just west of the added Stuyvesant Town area?

A. Yes.

Q. Going straight across here—I can't see the street but I think it's 14th, yes. From 14th north to 19th. According to your figures, what is the racial density on the basis that you had it before?

A. Between First and Third Avenues?

Q. Right here.

A. Yes, that's right. *S*

Q. Yes, I believe this is First to Third Avenues or thereabouts.

A. 12.2 per cent.

Q. Pardon?

A. 12.2.

Q. Now, Mr. Limoges, when you were speaking a moment ago, I don't remember all the facts and figures that were being used on your testimony a little while ago, but I do think when you were using—when you were making reference to these hypothetical exhibits—

A. Yes?

Q. —and the proposed ways of drawing Congressional district lines, you said something about using census tracts that you had only recently used.

[fol. 155] These census tracts as you used them for the final preparation of what is at this point in evidence as Exhibit 5, I believe—

Judge Murphy: 6, isn't it?

Mr. Galt: I believe it is Exhibit 5. Your Honor is correct; Exhibit 6, the last exhibit introduced.

Q. Those census tracts that you used were only recently made available, weren't they, in the form in which you have them? You spoke of a figure refinement. They were not extant in November, 1961, were they?

A. Well, certainly some figures on population were available.

Q. I asked you whether those were extant.

A. I don't know if this particular table was, but certainly the Legislature had figures on total population because they did—

Q. I didn't ask about the Legislature having figures on total population. I think the Court and everybody else is aware of that. I am asking about the particular census tracts that you mentioned in getting your latest computation of figures. You testified to that only a few moments ago.

A. I don't think that was available. I believe a census was done in the late Nineteen Fifties for New York City, [fol. 156] and this was at the request of the City; it was a case involving school funds from the State; that must have been available and then, of course, the 1950 census was available.

Q. Well, what were you referring to when you made these hypotheses of yours, the census tracts as you had them were not available in November of 1961?

A. I don't know that, sir. I don't know if that's true or not. I don't know.

Q. . . . You were not in the court at the last session when plaintiffs' counsel referred to the area in here, and

I assume plaintiffs' counsel will agree with my recollection, and certainly the transcript will show, that reference was made in the opening statement of counsel to the Lincoln housing project as being included in this area just west of Central Park, running from somewhere in the 50's on up north to this green line.

Now, do you know whether the Lincoln housing project is in that area?

A. The Lincoln housing project?

Q. The Lincoln Square. I haven't given it the proper label, but I think that identifies it sufficiently. I think it is [fol. 157] called the Lincoln Square project. That is how counsel referred to it, as I recall it.

A. You mean a housing project or the cultural center?

Q. Is there any part of a housing project in there?

A. East or west of the present Congressional district line?

Q. Within the 17th. In other words, east of this boundary line to which I am pointing, running up from somewhere, I think it is 54th Street, up to this—looks to me like 57th Street on the map, but that can't be correct, and you must be—

[fol. 158] Mr. Officer: 73rd Street. That's 73rd Street.

Q. At 72nd or 73rd Street, I am sorry. You don't know whether there is a housing project in there or not?

A. It's very difficult for me to say what was there in April, 1960, when the census was done. I mean all of these statistics are based on that. Changes have occurred, and I am sure in some areas the non-white and Puerto Rican population has gone up, in others it has gone down, but—

Q. I wasn't asking about the population, I only asked you and I wish you would confine yourself to that, whether you know any part of that housing project, the housing portion of the Lincoln project is within that.

A. I am not sure and I don't know if it was there in 1960 at all.

Q. Do you know if it is there now?

A. No, I don't, sir. It wasn't necessary to know exactly what project was there.

Q. I am not asking you whether it was necessary to know, I am only asking whether you know.

Q. No, I don't.

Q. Do you know where the Lincoln Square Project would be in terms of streets, around what street it would be? [fol. 159] A. I would say it would be in the low sixties.

Q. The low sixties? That would be very—somewhere in this area, right?

A. Yes, I would believe so.

Q. Or perhaps this area, which would it be, do you know (indicating)?

Judge Murphy: I don't know why we waste time on this. There must be somebody in the city who knows exactly where it is.

Mr. Galt: I wanted to find out—

Judge Murphy: The witness says he doesn't know and he's concerned with what was existing in 1960. Let's go on with this.

Mr. Galt: All right.

Q. Now, I believe earlier today you spoke about the method you used in computing your percentages, population density as shown on this exhibit, and you stated, if I recall correctly, that you had not counted persons of Puerto Rican origin who would be classified as Puerto Rican twice, putting them in different categories. Now, is it possible to figure the number of non-white Puerto Ricans from any of the data that you had available to you; is it possible accurately to figure that?

[fol. 160] A. Well, number 1, we have statistics of the total number of Puerto Ricans in Manhattan counted as non-white.

Q. Yes, I know that, but I ask you if it is possible—

A. Second of all—well, for each census tract with 400 or more Puerto Ricans, we have an exact figure on non-white Puerto Ricans, and once you subtract that total number of Puerto Ricans from the—once you subtract all of the non-white Puerto Ricans in tracts having 400 or more Puerto Ricans from the total non-white Puerto Rican population in Manhattan, I believe it's a rather small remainder.

Q. You believe it's a rather small remainder?

A. I could give you the figures on it—

Q. But you cannot figure the number of non-white Puerto Ricans or the percentage of non-white Puerto Ricans accurately, can you?

Mr. Feldman: I object to the characterization of "accurately". I don't know what counsel means by that.

A. The census is not completely accurate either. I mean—it's as accurate as any available method—

Q. I didn't ask you about the accuracy of the census.

[fol. 161] Mr. Feldman: Would the Court ask counsel to let the witness finish his answer before interrupting him, please.

Mr. Galt: I am sorry.

Judge Moore: I thought first you didn't want him to finish, then you do.

Mr. Feldman: Well, there was no ruling on the objection.

Judge Moore: Let him answer the question as he understands it.

A. (Continuing) Well, I believe that once you subtract those non-white Puerto Ricans for which you have figures on a tract basis—and I can do this in a little while and tell you exactly how many non-white Puerto Ricans are left over—the remaining number of non-white Puerto Ricans especially within the 17th Congressional District is very low because for Manhattan as a whole the average 5.6 of the total Puerto Rican population as of Manhattan was counted as non-white, and I believe the 17th—it's approximately what, 10,000 Puerto Ricans, something like that? So that comes out to 500 non-white Puerto Ricans, and figures were available for some of these, and so it's a [fol. 162] couple of hundred people that we're talking about in the 17th.

Mr. Galt: I move to strike the answer as not being responsive.

Mr. Feldman: I think the answer is completely responsive.

Judge Moore: Try again, Mr. Galt. Why don't you put another question.

Mr. Galt: All right.

Q. Can you from whatever data is available to you from the Borough of Manhattan, figure accurately the number of non-white Puerto Ricans in any given area?

A. Tract data have not been published. It can only be approximated, and on a tract by tract basis—of course, there is a great possibility of error, except that on those tracts you have a low Puerto Rican population, when you have 400 or more Puerto Ricans in a tract, you have the exact number that were counted as non-white.

Q. Let me ask you this, what if any count is made in the census statistics of persons born here in this city or in this country of Puerto Rican parents who were originally from Puerto Rico, or not from the United States?

A. They are counted under the Puerto Rican parentage [fol. 163] category. There is a born in Puerto and Puerto Rican parentage and there are figures available for each tract for each of these two categories.

Q. What you did was to make estimates, didn't you, from those tracts where the population was over 400? There is nothing tabulated where the amount in a tract is under 400; is that correct?

A. It's not published, as public information. It can be obtained, but it would be difficult, it would be a tremendous job.

Q. So you do your percentages by analogy, right?

A. Yes, by what we knew, and as I did state before, there is a certain error, but it's quite small, and in the 17th it's very small.

[fol. 164] Cross examination.

By Mr. Seavey:

Q. Mr. Limoges, you were asked on cross-examination by Mr. Galt what the percentage of the non-white persons would be if a line were drawn approximately from the south side of 89th Street to the northerly side of 94th Street so as to encompass the area bounded approximately by 89th Street on the south, 94th Street on the north—I think that was Third Avenue, Third Avenue on the west,

and the river to the east. You answered that question as being something less than 5 per cent. Would you be good enough to also advise the court as to how many gross number of persons could be added by simply drawing a line as I have indicated across the north portion of 93rd-94th Street?

A. Well, let me see. Well, that's 10,507, total population.

Q. That is approximately 10,000 people could be added in this district without adding an undue number of Negro persons or Puerto Ricans; is that correct?

Mr. Orans: Objection, your Honor, characterization "undue".

Judge Moore: Take out "undue".

Q. Without adding more than 5 per cent of Negro persons or Puerto Rican persons?

A. Yes, the population of Negro and Puerto Rican persons in this area is under 5 per cent.

Q. We could add 500 white persons and approximately non-white persons, is that correct?

A. Yes.

Q. I now direct your attention to this area bounded on the south by West 14th Street, on the west by Third Avenue, on the east by First Avenue, and on the north by what appears to be 20th Street on this map. Your attention has previously been drawn to that area?

A. Yes, sir, it's 19th Street on the north.

[fol. 166] Q. What was the gross number of persons—19th Street, I am sorry. What was the gross number of persons in that area?

A. 6,862.

Q. Of which approximately 600 are non-white people, is that correct?

A. Well, the total non-white and Puerto Rican is 837.

Q. Approximately 800 people then. So that we could add approximately 5,200 white persons and only 800 persons non-white into the 17th as redrawn by Chapter 980, is that correct?

A. Yes, correct.

Q. This entire south of South West 4th Street, and easterly—or westerly, rather of Third Avenue—do you see that area that I am pointing to?

A. Yes, right.

Q. Basically, what is the racial composition of that area?

A. Well, that is predominantly continental, white, I mean it's relatively low non-white and Puerto Rican.

Q. And that's an area that also could easily have been added to the 17th Congressional District as now defined [fol. 167] by Chapter 980 Laws of 1961, New York State; is that correct?

A. You mean that southern—?

Q. The lines could have been extended so as to encompass that if there were an intention to bring white persons only into the district, is that not correct?

A. But you sent a long narrow corridor further down, is that correct?

Q. I would just merely extend Third Avenue southerly and extend Park Street at this point, Park Street where it meets Bank Avenue—

Mr. Feldman: I object to the form of that question and move it be stricken, if your Honor please, because I think it's an unfair hypothetical when Mr. Seavey takes a look at the map of the 19th and if he can tell me how the 19th is going to come around the bottom of the island, I think it's impossible.

Mr. Seavey: I would go around so it has a scoop around the bottom. The witness has made all other assumptions. I should like to know what other assumptions were made.

Mr. Feldman: I want Mr. Seavey before he poses the hypothetical to show the witness how that can be done [fol. 168] before he asks him for the figures, and not make the 19th into two Congressional Districts.

Mr. Seavey: If I may withdraw my question, your Honor, I will make it precise and specific.

Judge Moore: We'll refer to these as the Seavey speculations and the others as the Limoges speculations.

Mr. Seavey: What I really intend to show by this cross-examination at this point, your Honor, is this, at one time during your court examination of the witness, and the repartee with Mr. Feldman, you mentioned there were

several ways in which the 17th could be enlarged so as to bring more persons into it. I merely would like to show that there are not several ways, but an infinite number of ways, many of which include the great potential of bringing white persons into the district and excluding Negro persons. If this were the intention of the Legislature that could easily have been done, and I am merely exploring some of those ways. What I am saying is that these hypotheses, A hypothetical, B hypothetical, and C hypothetical, are not the only hypotheses.

[fol. 169] Q. If I may turn this over—Mr. Limoges, your examination of the census tracts and other data available to you concerning the redistricting of the 17th, 18th, 19th and 20th Congressional Districts, was there also made [fol. 170] available to you the past voting records on a Republican and Democratic bases and other bases?

Judge Murphy: I didn't know there were voting records, were there? You mean how the people vote? I do not understand what you mean.

Mr. Seavey: On an Election District basis.

On how various districts voted in terms of Republicans, Democrats, Liberals.

Q. Do you have these figures available?

Mr. Feldman: I object to this question as being irrelevant and outside the scope of the direct examination.

Judge Moore: I think we might as well take it. We have been taking everything else.

A. I have not dealt with voting or registration.

[fol. 171] Q. Then your testimony does not at all indicate what the voting potential in various areas surrounding the 17th is or was?

A. No, no, it doesn't.

[fol. 174] Q. There is an area which was run through on

direct examination, which extends roughly from on the south, West 34th Street, to on the north, West 54th Street, on the east by Eighth Avenue and on the—

A. And west—

Mr. Offner: West.

Q. On the east by Eighth Avenue, is this area right here that I have reference to, on the east by Eighth Avenue and on the west by Tenth Avenue. I have particular reference to these two tracts, one included within the 17th and one excluded from the 17th. The one which is included within the 18th, is that census tract—

Mr. Feldman: 18th?

Mr. Seavey: 17th.

Q. This being included in the 17th, is that census tract bounded on the south by West 34th Street, on the east by Avenue of the Americas, on the north by 42nd Street, and on the west by Eighth Avenue? Would you again give us the percentage of non-white persons in that area?

A. Correct. Those are two tracts there.

Q. Two tracts, yes.

[fol. 175] A. From 34th to 42nd, right.

Mr. Feldman: I believe he has already testified as to that, too, sir.

Mr. Seavey: I want to compare it, because he has not testified with comparison to the two tracts contiguous therewith and lying immediately easterly thereof.

A. Of course the percentage is just one measure of population.

Q. Let's take the first.

A. There is also a measure of density. Well, the first tract, the southern tract, from 34th to 38th, between Sixth and Eighth, has a total population of 308 people, a total—and out of that 63 are Puerto Ricans and non-whites, giving a percentage of 20.5.

Q. That is this most southerly tract; is that correct?

A. Yes, right.

Q. What about the northern tract?

A. The next one that has a population of 450. That I believe is a garment section and shopping, and so forth.

Q. Yes. And what is the percentage of non-white persons living in that?

[fol. 176] A. The percentage is 27.1, that is 122 people, that is, 122 non-whites and Puerto Ricans.

Q. Let's take the area immediately south, or immediately westerly of the area just testified to, that is the census tract bounded on the north by 42nd Street, on the east by Eighth Avenue, on the south by 38th Street and on the west by Tenth Avenue.

A. Right. Well, here is where the total—

Q. Let's have the percentages first.

A. Percentages. For the southern tract, 17.6 per cent, or 699 non-whites and Puerto Ricans out of a total population of 3,975.

Q. Let me have those figures again, if I may?

A. Well, it is easy if I do it across the line. I have them set up this way.

Q. All right.

A. For the southern tract, total population 3,975. Total Puerto Rican and non-white, 699, giving a percentage of 17.6.

Q. What was the percentage in the area included, so we can compare it?

A. The percentage is 20.5. The total Puerto Rican and non-white is 63. You really have to have both measures to get the complete picture.

[fol. 177] Q. All right, let's take the northern tract?

A. Right. For the northern tract, for the tract between 38th and 42nd, from Eighth Avenue to Tenth Avenue, 1,849 people, 250 Puerto Ricans and non-whites, 13.5 per cent.

[fol. 178] EDWARD LIMOGES resumed.

Redirect examination.

By Mr. Feldman:

Q. Mr. Limoges, on cross-examination Mr. Galt asked you whether the census figures for the old 17th had included Mt. Sinai Hospital. Now, the census figures for the new 17th Congressional District, and from your calculations from those figures showed approximately 19,000 non-whites and Puerto Ricans in the new 17th; is that correct?

A. Yes.

[fol.179] Q. And did that include the census tracts covered by Welfare Island and Bellevue Hospital, which are in the new 17th?

A. Yes, it did.

Q. Now, Mr. Limoges, I believe your figures also conclude that the percentage of non-whites and Puerto Ricans in the new 17th is approximately 5.1 per cent.

A. Yes.

Q. Is that correct?

A. That's right.

Q. Was the percentage of non-whites and Puerto Ricans in the old 17th higher or lower than that?

A. It was higher.

Q. How much higher?

A. 6.6 per cent Puerto Rican and non-white in the old 17th.

Q. So that the Puerto Rican and non-white in the old 17th were approximately 16 per cent more than the Puerto Rican and non-white in the new 17th; is that correct, or the percentage figure was 16 per cent higher?

A. I don't have the figure on me.

Q. Well, comparison of the 5.1 to the 6.—

A. Yes, sir.

Q. 6.—what was that you said?

[fol.180] A. 6.6.

Q. 6.6. In other words, the percentage of Negroes and Puerto Ricans in the new 17th is approximately 16 per cent less than the percentage of Negroes and Puerto Ricans, or non-whites and Puerto Ricans in the old 17th; is that correct?

A. Yes.

Q. Now, Mr. Limoges, in the study of census tracts for Manhattan, did you review the census tracts which include low cost public housing units in Manhattan?

A. Well, those tracts were included in the ones I worked with, yes.

[fol.181] Q. Mr. Limoges, what is the percentage of Negroes or non-whites and Puerto Ricans in Manhattan, over all?

A. Well, it is over 600,000—yes, over 600,000, so about 30 per cent, just speaking roughly. I don't have the percentage figure worked out here, but it is about 30 per cent.

Q. It is the figures that are set forth in Plaintiff's Exhibit 2 in evidence, the table, page 3 of the trial memorandum; is that correct?

Judge Feinberg: That is Plaintiff's Exhibit 3.

Mr. Feldman: 3. Excuse me. Yes, sir.

A. Yes. The total non-white population in Manhattan, total non-white and Puerto-Rican, 639,692. That is 37.7 per cent.

Q. Non-white and Puerto Rican.

A. Right.

[fol. 183] Recross examination.

By Mr. Galt:

Q. Now are there more non-whites and Puerto Ricans in the present 17th District than there were in the old?

[fol. 184] A. Yes, with the increasing population, yes, yes.

[fol. 197] Mr. Galt: If your Honors please, I would like to state to the Court that as far as the production of any witnesses or evidence in that sense of the term, we believe that no useful purpose would be served by burdening the Court with any detailed recital of figures, any excursions around territory. We feel that the facts subject to judicial notice by the Court and available material to the Court will sufficiently enable the Court to pass upon any questions of law which may be involved in this case.

The only thing I would like to submit to the Court—and [fol. 198] I think that counsel will consent to this—are certain statistics from the Bureau of Census with reference to the 17th District, which may or may not already be appropriately in the record. But on the chance that perhaps they are not, since many figures have been gone over, and my memory is not quite so accurate as to all these figures

that I am certain of, I think this should be introduced, and beyond that we have no witnesses to offer. I don't know about the intervenors, but we feel we would be prepared to argue the case at such time as the Court designates on its merits, and with the submission of this additional exhibit.

These are facts, incidentally, which the Court anyhow could take judicial notice of.

Mr. Galt: All right. Then I will offer this as the only [fol. 199] exhibit for the defendants.

(Defendants' Exhibit A received in evidence.)

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Moore: * * * Now, the intervenors, what, if any, material would they like to have offered in evidence, other than the arguments that they will make in brief, if they so choose?

Mr. Seavey: Your Honors, we basically agree with the position just taken by Mr. Galt that there is insufficient evidence in the record to substantiate the plaintiffs' case. However, we have proposed certain affirmative defenses, some of which I think we can dispense with evidence, in that they are matters on which the Court will be able to take judicial notice and on which we will be able to encompass that in our briefs.

[fol. 207] Mr. Feldman: Do I understand, sir, that the intervenors have no proof to offer and that they are confining themselves to oral argument and briefs?

Judge Moore: The record for all parties will be as it stands as of this moment.

[fol. 210] Mr. Feldman: Does your Honor want these briefs directed both to the declaratory portion of the relief and the implementation of it, of any declaratory motion? We have taken the position here, as I know the Court is

well aware—we have not moved for preliminary injunction. In our trial memorandum we said we would separately brief and argue the question of relief. We would for the time being prefer to confine ourselves merely to the question of the constitutionality of the statute, without going at that point into the implementing relief unless the Court later wants that in which case we can do that separately, brief or argue that, and obviously we can do the whole thing at once. We would prefer treating the issues separately because we think they should be treated separately.

Judge Moore: I know it is sometimes helpful to address yourself along the lines that are bothersome to the court, and I must confess that I see three—I won't even call [fol. 211] them issues—but I have heard three pseudo issues raised: one is some kind of argument based upon some kind of a racial issue, one by the injection of county committees, a certain political party has apparently attempted to inject a political issue, and finally through Mr. Limoges' and your arguments, Mr. Feldman, a numerical issue as to each voter possessing one-four hundred and nine hundred thousandths of a vote, and I have read your brief, I know that one of them says that you rely heavily on the Gomillion case, and having had opportunity on several occasions to study it quite carefully, I find difficulty in relating the decision there to this case. So that if you can so relate it, and help me out, that would be helpful, too. I don't think we have in this case the factual background that the Supreme Court had in *Baker v. Carr* because if I read that decision correctly, the bothersome point there was that a small group in one section of the state elected—

Mr. Feldman: We have never contended it was as in *Baker v. Carr*.

Judge Moore: —whereas a large group in one part of the state also elected but one person and there was gross dissimilarity in voting rights in that case.

[fol. 212] Now, don't do what so many lawyers do, try to take one set of facts in one section of the country and then try to distort or compress or mold them to an entirely different situation. Address yourself to the specific facts, to the specific area in which we are living and as to which as is the case we will have to decide the issues.

Mr. Feldman: Before we adjourn for the day, sir, I would just like for the record to move to dismiss the six affirmative defenses interposed by the intervenors in their answer for lack of proof.

Judge Moore: We will reserve decision on all final motions.

[fol. 214]

Transcript of Proceedings—August 28, 1962

Judge Moore: Mr. Feldman, I guess it is your privilege to lead off.

ARGUMENT BY MR. FELDMAN

Mr. Feldman: Thank you, sir.

May it please the Court, I would hope to keep my argument this morning short. I think the facts have been adequately established and the facts and the law adequately briefed by all parties. Nevertheless, I will start by making one point abundantly clear:

Since this case first arose, or the first hearing on this case before Judge Feinberg on the motion for the appointment of the statutory court, defendants have skilfully tried to make it appear that we have based our complaint principally upon *Baker v. Carr* as a case of under-representation because of the variation in the size of the Congressional districts.

We have tried to make it clear in the past and again in the brief, and I want to stress this morning, that we view this not as a under-representation case principally but as a discrimination case, which squares with *Gomillion v. Lightfoot* and which meets *Baker v. Carr* only in that one of the evidentiary facts that establishes the discrimination is the variation in representation, and that furthermore one of the forms of harm—although we do not believe [fol. 215] that harm is a necessary element of proof in a case involving violation of constitutional rights—results from the under-representation.

I say that simply because I think it is reasonably well established that the deprivation of constitutional rights in and of itself is harm.

We say this is the Gomillion case in a big-city sense. It is about as close to Gomillion as you can get in a big city, and, as Mr. Justice Frankfurter stated in his opinion for the Court in Gomillion, the Fifteenth Amendment strikes at both the rudimentary and the sophisticated forms of discrimination.

This is city slicker, Gomillion in a sense, not quite as crude, perhaps, as it was in Alabama. We don't feel that the distinction can be made as the defendants have tried to make it, on the ground that it does not involve a municipality or the redistricting of a municipality, nor do we feel that the distinction can be made on the ground that there was a long history of racial struggle and conflict in Macon County, Alabama.

What we have here is a fencing out and a fencing in, as described very succinctly by Mr. Justice Whittaker in [fol. 216] his concurrence on the Fourteenth Amendment ground, and also a segregation on the basis of race and special discriminatory treatment involving the Fifteenth Amendment, which Mr. Justice Frankfurter refers to in his opinion for the Court.

We have four districts in a self-contained island, which is not a very difficult geographical configuration. Of the four, we have one district 95 per cent white and non-Puerto Rican.

We have one district 85 or 86 per cent non-white and Puerto Rican, containing approximately one-half of 1 per cent of the white population.

While we have seen that there are sufficient cases, that cases have been decided in the state, that neighborhood alone is not a basis for segregation, nevertheless we don't even have a straight neighborhood consideration here along which this could be justified. We think we would make out a case simply by showing the 95 per cent white district adjoining the 85 per cent non-white and Puerto Rican district, with less than one-half of 1 per cent of the island's white population in the second, but coupled with the fact that we have gerrymandering and the jigsaw lines in order [fol. 217] to produce that result, coupled with the additional fact that we have a deliberately under-sized district

so as to produce that result, coupled with the fact that when the district had to be enlarged because we went from six districts to four districts, areas were chosen which didn't necessarily straighten out lines, which added 101,716 persons to the old 17th of which only 2.1 per cent were non-whites and Puerto Ricans, when, had they expanded in any other direction, they could not have achieved that result.

We also believe that although, as we have stated in the brief, historical considerations are probably irrelevant, there can be no historical justification for this, because if we go back to 1911, we find that the districts in New York County were approximately equal in population and were drawn by the creation of roughly parallel lines running east and west across the county, in much the way which plaintiffs have suggested as one of their so-called rational constitutional alternatives.

We find that as recently as the 1951 redistricting, the 17th on a population basis was not undersized, and the districts were almost equal in population based upon the 1950 census.

[fol. 218] So there is no historical basis for having this district smaller than the others.

If they were looking for historical bases in adding to the district, there was a historical basis for adding the portion that had been in the district from 1941 to 1951, running from 73rd Street to 97th Street, between Central Park West and Columbus Avenue. That had been in the district in 1941 to 1951, had been in the district from 1922 to 1941.

The Stuyvesant Town area had never been in the district. The Upper East Side had never been in the district. Therefore, we can find no historical basis for adding and selecting to add the portions that they did.

Also, we must recognize that this statute contemplates districting for at least ten years, and the defendants have urged that there are areas, predominantly white areas, which were not included in the 17th, and that therefore they have negated our allegation.

We have proved on the trial that if the adjoining white areas were added, the district would still be undersized,

and the district would still contain less non-whites and [fol. 219] Puerto Ricans proportionately than any other district.

But even there we find an interesting thing:

In the southern portion it would be difficult to add the so-called white areas without cutting off the 19th district, which comes around the bottom of the Island, or, if you did not cut off the 19th and bisect it, so to speak, you would add very few persons, not enough to make any difference.

At the northern end, we find that the buffer zone technique was used in that it is a known fact in this city that the white areas have not been pushing up onto Harlem, but the non-white areas have been pushing down to the East Side. That is No. 1.

No. 2: We find that on May 28, 1959—and I ask the Court to judicially notice calendar No. 288 of the Board of Estimate calendar of that date—and I hand up a true copy of the resolution adopted by the Board of Estimate on that date—a public housing project, federally assisted public housing project was approved for that area.

Since that time that initial project has been expanded. I hope to have a letter here this morning, which I would ask the Court to let me add to the record, and I should have [fol. 220] it momentarily. It is from the City Housing Authority, stating that they now have under construction, as of June of this year, Swope Houses North and are planning to expand it with what will be known as Swope Houses South, which will cover the area 91st Street to 96th Street, East River to First Avenue, and will thereby occupy most of that area.

While legislative intent is not significant, I think it can be recognized that the Legislature was undoubtedly aware of the plans for the area.

Also, the records of the City Housing Authority indicate—and this too will be available in this letter which I will ask the Court to receive—that housing projects of this sort in Manhattan contain an average of 74.1 per cent non-whites and Puerto Ricans.

What we see, therefore, is that had this district been expanded and not kept undersized, had it been expanded

to the north, as Mr. Limoges' testimony indicated, even before the construction of these public housing projects, you would have trimmed the number of non-whites and Puerto Ricans in the 17th. Had it been expanded to the south, you would have almost doubled the number of non-[fol. 221] whites and Puerto Ricans in the 17th, and therefore, the undersizing of the district combined with gerrymandering and the resultant effect makes out, in our judgment, at least, a prima facie case of discrimination and discriminatory districting.

Now, we say this is Gomillon, because this is a case of ghettoizing the Island of Manhattan. The resultant effect of the districting created by a relevant portion of Chapter 980 is to do just that, is to create a white Congressional district and a non-white Congressional district, and as to the other two districts to divide them roughly evenly among whites and non-whites, and a Congressional district created as a ghetto has its inherent dangers, apart from the constitutional violations, because a Congressional district in a sense creates a community of its own.

There are community problems which are treated on a Congressional district basis; certain projects and appropriations are lobbied for in the Congress on Congressional district bases.

Judge Moore: Just so I understand the points of your argument, is that good or bad, Mr. Feldman?

Mr. Feldman: Is it good that it be ghettoized? Bad.
[fol. 222] Judge Moore: Not ghettoized, because the use of such words is hardly helpful to the Court or the public. What I am asking is, is it not a fact that the Congressional districts of the farm and dairy areas upstate have their problems; the Congressional districts in large metropolitan areas have their problems, and they are diverse, and have not the Courts not recognized that fact in the various distributions and allocations of populations within various districts, Congressional or otherwise?

Mr. Feldman: That is right, sir, and I think that may be an appropriate consideration in redistricting.

Judge Moore: The reason I asked whether it was good or bad is that if you were to create a Congressional district

consisting largely of Negroes, who would have their problems and thus would have an opportunity to elect a member of their own race, I am just wondering if it would be constitutional if you took that right away from them, since I understand your figures are some 600,000 to 1,600,000, and if you divided all Congressional districts in New York on that basis, would you not thereby deprive them of the [fol. 223] very things that I suspected you were arguing in favor of?

Mr. Feldman: Well, sir, first of all I don't think you would, and second of all, I don't think that that is a relevant consideration because I don't think it is any more a relevant consideration in the North to say if you dilute Negro voting strength, you may end up with a white Congressman, than it is relevant in the South to say, if you permit the Negroes to vote you may not elect a white Congressman.

I think the result is exactly the same. Integration is integration. You can't have it both ways.

As a matter of fact, who is to say that the Negroes of this community are better off being shoved into one area, where they can only influence the election of one Congressman, than they would be if their voting strength were permitted to influence the election of all four Congressmen?

This I am not qualified to answer, and I don't think it is the province of the Court. I think the only province of the Court in this area is to determine whether or not these districts have been created with racial considerations in [fol. 224] mind, and, if they have, or if the results of this districting, the effect of the statute is to create racially segregated areas, we maintain that it violates the Fourteenth and Fifteenth Amendments.

As a matter of fact, in our so-called alternative hypotheses that Mr. Limoges testified to and were concerned in Exhibit 6, I believe, if the Court would note, under one of the hypotheses, the Negroes and Puerto Ricans would only have 16 per cent of two Congressional districts, and under none of the hypotheses would they have as few or as small a percentage of any one district as they now have. Under none of the hypotheses would there be less than 58 per cent, I believe, Negroes and Puerto Ricans in any one district.

But this concept of the beneficent quota, sir, I suggest is a concept which has been—I don't want to say ignored, but I would say repudiated by the Supreme Court of the United States.

Judge Moore: What constitutional rights would they be deprived of?

You remember, a week ago I asked you as to the effects of Gomillion, because there it was very clear that those who were fenced out of the city were deprived of their [fol. 225] right to vote in the City of Tuskegee. That was perfectly clear in that case. It was a definite deprivation.

Now, in this case of yours, what deprivation will come to pass if the boundary lines remain as they are?

Mr. Feldman: The deprivation is simply the segregation. No. 1: That in and of itself is a deprivation of constitutional rights. As Mr. Justice Frankfurter stated in his opinion in Gomillion, when a Legislature singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.

Judge Moore: There the discrimination was that they were put out of the City of Tuskegee by this redistricting, absolutely out.

Mr. Feldman: But, sir, may I call your attention to the fact that there was no showing, nor was there any place in the record of any consideration of whether they might not be better off.

It might well be that the tax rates would have been lower outside the City of Tuskegee. It may well be that they could [fol. 226] have elected their own people to office outside of the City of Tuskegee. It was made clear that they had the right to form their own municipality.

Judge Moore: The Courts were not involved with whether they would be better off, or all those special situations. The question is, were they deprived of a right which they previously had, namely, to vote within the City of Tuskegee for city officers?

The Court held, as was perfectly clear from the way the boundary lines were drawn, that they were excluded by this maneuver.

Mr. Feldman: That is true. They were excluded from the City of Tuskegee. I don't know that they had any more of a constitutional right to be included in the City of Tuskegee than the people who were excluded from the 17th District would have to be in the 17th District, or, to put it another way, that the people in the 17th District have any less than the 18th District, who are thrown into an oversized district and an almost non-white and Puerto Rican district.

I don't think that they have any less right to be in the 17th district than the people who were excluded from the [fol. 227] City of Tuskegee would have had to be in the City of Tuskegee.

Mr. Justice Whittaker makes it abundantly clear that in the newly created area they would have had the same rights as anybody else, but that the harm and the violation of the Fourteenth Amendment results simply from the discriminatory treatment.

Mr. Justice Douglas makes this clear in his concurrence in *Baker v. Carr*, and Judge Ryan in his initial opinion dismissing the complaint in *WMCA v. Simon* also makes clear that he would have reached a different result if there were any showing of racial discrimination in the drawing of legislative lines, never pointing, never suggesting that this would have been because of the fact that these people would have been excluded from the State of New York or excluded from any particular district in the State of New York.

Similarly, Judge Levet in his opinion for the Court on remand in *WMCA v. Simon*, distinguishes that case from the situation in which there would have been a racial effect alleged.

Now, if your Honors please, I think we have shown a violation of the Fourteenth and Fifteenth Amendments. [fol. 228] No rational or constitutional justification has been offered by the defendants. They have claimed that we have not discharged a burden of proof, but they have ignored the fact that the burden of proof in racial discrimination cases is different from what it is in economic classification cases.

Here we have made out, as *Texas v. Hernandez* discusses, our *prima facie* case. We have alleged the discrimination. We have shown the existence of racial segregation, and it

would then be incumbent upon the defendants to come forward with some proof of an alternative rational basis.

It is not our job to set up the straw men and knock them down in a racial discrimination case.

We have also considered in our brief the question of relief, and I think we have adequately covered the fact that the shortness of time should not act as any bar to relief, that there are reasonable, equitable alternatives for the Court to adopt and use in this situation and that the proximity of the primary in and of itself does not create a problem.

The reason we did not seek a preliminary injunction against the primary is because we are satisfied that there [fol. 229] is alternative statutory basis for the selection of candidates under New York election law in the event any of the candidates are disqualified, any of the candidates nominated in the primary are disqualified by the Court by virtue of any declaratory relief here.

The only other question which the defense raises is the question of whether or not the Governor is a proper party. We believe the Governor is a proper party.

Colegrove v. Green, which went off on other grounds and which preceded Baker v. Carr, indicates that Governor Green was considered to be a proper party.

The cases which the Attorney General cites in support of his allegation that the Governor is not a proper party all relate to claims against the Governor by virtue of his action in vetoing or signing bills.

The Governor is charged with the overall responsibility of administering all the laws, including the election law, and many of the executive functions relate to the conduct of elections.

I merely want to suggest in closing to the Court that the [fol. 230] New York Legislature has a habit of stating things indirectly, and we are all familiar with the technique that runs throughout the statutes of saying, "Cities of more than one million or more than two million" when they mean the City of New York, or "Cities with populations in excess of 500,000" when they mean Buffalo or Syracuse, or "Cities with populations of more than a quarter of a million and less than 500,000" when they mean Albany.

I have never really understood why, because I don't think that it would necessarily be unreasonable classification if they named the city, but they have this habit of indirection, and I merely suggest to the Court that if this portion of 980 which we have attacked, paragraphs 17, 18, 19 and 20, were to read, in haec verba, that there should be four Congressional districts in the County of New York, that the population of each of them in so far as practicable will be numerically equal to that of the others, except that the population of the first of said district may be approximately 15 per cent less than that of any of the others, if such be necessary to effect the following result, and went on to [fol. 231] say that:

(a) The first of such districts shall contain no more than 3 per cent of the county's population of persons who are non-white or Puerto Rican;

(b) That approximately 95 per cent of that district shall be of the white race, exclusive of persons born in Puerto Rico or of Puerto Rican origin; that the second of said districts shall contain at least 50 per cent of the county's population of non-white persons or persons of Puerto Rican origin; that approximately 85 per cent of the population of that district shall be persons who are non-white and persons who are of Puerto Rican origin, and that said district shall contain no more than one-half of 1 per cent of the county's white population, exclusive of persons of Puerto Rican origin, and that the third and fourth districts in the county shall contain approximately one-half of the non-white and half of the Puerto Rican persons, the statute had been drawn in those words, I don't think the Court would have any trouble in declaring it unconstitutional, and I suggest that if the statute were drawn in those words, these are the [fol. 232] district lines you would end up with, because I know of no other way in which you could end up with one district of 85 per cent non-white and Puerto Rican, containing only one-half of 1 per cent of the county's white population, and with one 95 per cent non-white and Puerto Rican district containing only 3 per cent of the county's white population.

Judge Moore: Mr. Feldman, do you think that a federal statutory court has the power to single out one district out of the 41 in the State of New York, namely, the 17th; and for us to say, well, we think that if we were doing it, we would go eight blocks to the north and three blocks or four blocks further to the south, and maybe two blocks to the west, and therefore that we will override the Legislature to that extent; and as to the 17th we will declare those to be the boundaries of that one district?

Can we single out one-forty first of a statute to be unconstitutional?

Mr. Feldman: I think you can, sir. Yes. I think we have cited adequate authority under the severability section of our brief to indicate that where, without cutting [fol. 233] up sentences, one portion of the statute is unconstitutional, the Court would be constrained to save the rest of it, and I think what you have here is, if the 17th was created as a discriminatory district, and the 18th was created as a discriminatory district, I think the four paragraphs, the four clearly separable paragraphs of that statute could be stricken down by this Court without disturbing the other 37 paragraphs.

Judge Moore: Then let me ask:

If some subsequent statutory court were convened at the behest of those whom we put into the 17th and who said that they were thereby deprived of their constitutional right to be in the 18th, could that Court then undo our redistricting and declare new lines and so on?

Mr. Feldman: First of all, sir, we are not suggesting that the Court move the lines four blocks in one direction or two blocks in another. We are not suggesting that the Court in and of itself redistrict. We believe that a declaration of unconstitutionality will produce the result that it has produced in other states, in some twenty other states, where the Legislatures have then met to redistrict in accordance with the Court's opinions.

[fol. 234]. We feel that if the Legislature were not to do that—and we can hardly believe that they wouldn't—the Court could then redistrict with the use of a Special Master.

Judge Moore: But in every other case—and correct me, if I am wrong, because as I read them in every other case the question arose as to representation. You had vast discrepancies. One group of 10,000 was electing one representative, and another group of 200,000 was electing one representative, and that was at least, if not discriminatory, rather a vast divergence in population.

Now, here, would you have us get back to the numerical? I thought when you opened your argument you said you did not depend upon that.

Mr. Feldman: No. I am not depending upon the numerical, except as the numerical is necessary to avoid the implications of racial discrimination, except I am suggesting that the numerical approach cannot be used for the purpose of creating segregated districts, which is what I think has been done here.

The reason was this one district, or the only reason I can logically ascribe to the fact that this one district out of [fol. 235] the four is undersized is because by being undersized it makes possible the kind of racial discrimination and disparity we have complained of.

Judge Moore: You think it would make it constitutional, therefore, instead of unconstitutional, if a greater jigsaw puzzle were created, which would embrace or bring in about 50,000 non-whites?

Mr. Feldman: I don't think that you would need to create a greater jigsaw puzzle to do it. I think that you could square off the lines in the North or the lines in the West and South, and you could adopt—I don't mean the Court, but the Legislature could adopt any of the other alternatives suggested to bring about a division of districts that does not result in racial discrimination.

Judge Moore: I gather so far as you are concerned the geometry of the situation does not bother you so much, as long as a large number of non-whites are brought into the 17th; is that correct?

Mr. Feldman: I wouldn't say the geometry wouldn't bother me. I would say—

Judge Moore: In other words, you like square corners and tracks.

[fol. 236] Mr. Feldman: I like square corners and tracks because they are rational. I find any deviation from rationality which results in racial discrimination abhorrent.

I think that would be a fair statement, sir.

Now, if I may, I asked the Court at the time of the last hearing if I may supplement that with respect to these housing projects in the North. I have just received a letter from the New York State Housing Authority, which I show to Mr. Galt and ask leave of the Court that it be included in the record. I ask leave, sir, to make this letter, referring to the records of the New York City Housing Authority, part of the record in this case.

The Court: Any objection?

Mr. Galt: Your Honor, I might state that there is an objection, and without going into great detail, the sheerly speculative nature of this letter--no reference to where these past housing projects are located so as possibly to explain some of these percentage figures; speculative as to what in the future might happen here in going beyond even in the realm of the speculative to the extent that we have had in this case.

[fol. 237] However, I assume, as with the other evidence, it will be received, and I merely note my objection for the record.

(Marked Plaintiffs' Exhibit 7 for identification.)

Judge Moore: Very well. It may be received.

(Plaintiff's Exhibit 7 for identification was received in evidence.)

Mr. Feldman: I will furnish the Court with photographs.

Judge Moore: Does anyone else desire to speak before the Attorney General makes his argument?

Mr. Sandifer, do you desire to say anything?

Mr. Sandifer: Yes, your Honor. I did not know in what order you were going to receive the—

Judge Moore: I think it would be best to have all speak before the Attorney General, and then he can make his argument in the light of what has been said.

Mr. Sandifer: Yes.

MOTION TO AMEND THE TITLE TO INCLUDE THE NAMES OF
THE INTERVENORS AND GRANTING THEREOF

Before I begin, your Honor, I would respectfully ask the Court at this time formally to permit the title of this action to be amended to include the names of the inter- [fol. 238] venors. We note, both on the Attorney General's brief as well as on the plaintiffs' brief, that the intervenors are not named in the title, and, of course, we make this application with the view as to what might possibly happen in the event an appeal is taken in this case.

I would respectfully move at this time to amend the title to include the names of the intervenors.

Judge Moore: Very well. The request to amend is granted.

Mr. Sandifer: Thank you very much.

Judge Moore: And it may be considered as the title shown on, I think, the intervenors' papers.

Mr. Sandifer: Thank you very much.

[fol. 239] ARGUMENT BY MR. SANDIFER

Mr. Sandifer: I would like to confine my argument and my comments to the classification of the cases that the plaintiffs have referred to here in support of their argument, and I say, with a degree of candidness, that while we appreciate the good intentions, I would say, of Mr. Feldman and the plaintiffs here, we do not at all subscribe to the theory of their case.

I would even go so far, your Honors, as to say that if I personally believed for a moment that the basis for redrawing the lines in the 17th Congressional District were based upon race or place of origin or birth, I would be the first to join the plaintiffs in the relief that they are seeking here. But we do not believe that the lines were drawn on a racial basis. I say that very candidly. I say that very frankly. I do not doubt that there were political reasons for the lines to have been drawn in the manner in which they were, but I don't believe that they were drawn because of race, and we don't that the plaintiffs have sustained the

burden of proving that these lines were drawn on a racial [fol. 240] basis.

Judge Feinberg: Mr. Sandifer, could I ask you something? I just want to make sure I understand your position.

Is it your position that if they were drawn on a racial basis, you would agree with the plaintiffs that that was unconstitutional?

Mr. Sandifer: I would wholeheartedly, yes, Judge Feinberg. I would.

Now, the plaintiffs here have invoked the jurisdiction of this Court based upon the civil rights statutes that they have referred to, and they claim that they are seeking to redress an alleged deprivation of the plaintiffs' rights in this particular litigation.

Now, we take the position, your Honors, that the plaintiffs here have relied very heavily on Gomillion v. Lightfoot. That seems the heart of their case here.

We believe that this Court, before it goes any further in this litigation, must answer the question as to whether or not the lines of the 17th Congressional District were drawn intentionally to segregate eligible voters by race or place [fol. 241] of origin. If the Court concludes that the answer to that question is no, then we don't believe that you reach the rest of the argument that the plaintiffs have advanced here in this case, because the very basis of having invoked the Court's jurisdiction here is based upon those sections of the civil rights statute which they have referred to, both in their complaint and in their brief.

Now, the Court is quite familiar with and we have discussed at length the Gomillion case in connection with Mr. Feldman's main argument, but the Gomillion case as distinguished from this case—the very basis of the Gomillion case was based upon the Fifteenth Amendment and the deprivation of the rights of the Negroes who had been cut out of the City of Tuskegee, and only the Negroes had been cut out of that district. Not a single white person was taken out of the district in the Gomillion case.

The Court made it very clear that the basis upon which the decision was made in the Gomillion case was based upon a deprivation of the rights of the Negroes to vote in the

municipal election along with other facilities that these Negroes would have enjoyed as residents of this particular area.

The plaintiffs have not shown here, and we do not believe from a practical point of view, whether it makes any difference to a Negro or Puerto Rican whether he is in the 18th Congressional District or the 19th or 20th or the 17th, in so far as his rights are concerned, with respect to the various Congressional districts.

We don't believe that he has been deprived of any peculiar right as a result of having been shifted into one district from another.

But it would appear that the very thing that we don't feel that we want to see happen here is what the plaintiffs are here arguing for, and that is to have the four Congressional districts drawn on a racial basis, that is, distributing the Negroes and Puerto Ricans or other minorities into the four Congressional districts on a racial basis. That is the very thing that we don't want.

Now, in so far as the other lines of cases that the plaintiffs are citing here are concerned, they have cited several of the Texas primary cases, including the Jaybird case, the Terry case. But there again, in the Jaybird case, the [fol. 243] Texas case, there the Jaybird primary was the real primary. That was the real ball game in Texas. And Negroes were prevented from voting in this particular primary, which was held on a different date. It was a pre-primary. The regular primary was held in July, and the Jaybird primary was held prior to July. I believe it was in May. And the Court there found that in this pre-primary, going back as far as 1889, every Jaybird candidate who had been nominated in the pre-primary—that that was tantamount to election, and the Court held there that that was a deprivation of Negroes' rights under the Fourteenth and Fifteenth Amendments.

That case is clearly distinguishable from the situation that we have here.

Now, the plaintiffs have cited a whole line of the school cases, going back to Brown v. Board of Education. We think that line of cases is distinguishable also, because in the Brown case as well as in the whole line of school cases

that led to the decision in 1954, there we had state statutes that we were dealing with, where there was a clear intention to segregate Negro children into separate schools, and there the Court found that there was a deprivation of the [fol. 244] rights of these children in the denial under the equal protection clause of the Fourteenth Amendment.

The Court also concluded that segregated education was an inferior education, and therefore these children were deprived of a substantial right.

They also cited a case that is my own case, and that is the case of *Branche v. Board of Education*, which was argued by myself before Judge Dooling, over in the Eastern District.

In that case, as distinguished from the New Rochelle case, the Taylor case, which they have cited here in their brief—in the *Branche v. Board of Education* case, along with all of the other de facto cases that we have here pending in the State of New York, including Rochester, those cases are based upon a de facto school segregation situation. In other words, Judge Moore, we believe that we are coming to grips with your dissent in the Taylor case, because in the Branche case, *Branche v. Board of Education*, we were not dealing there with the situation of a gerrymandering of a school district, because we took the position and we concluded and we admitted to the Court that in [fol. 245] Hempstead the lines have not been redrawn in Hempstead since 1939, and the lines were corrected as a result of our position on the part of the National Association for the Advancement of Colored People as far back as 1939, and those lines were corrected at that time.

But despite that fact, we have developed in Hempstead a serious racial imbalance between white and Negro children in these various schools in Hempstead.

Judge Dooling said here—and we conceded, we didn't make any attempt at all to argue against or deny the factual situation that was set forth by Dr. Kincaid in the Hempstead case—we conceded that everything that he said was true in so far as the Board of Education not being responsible for this racial imbalance was concerned, but we said that the Supreme Court had said in the Brown case that segregation, no matter in what form it may come, is

harmful, and our whole argument in *Branche v. Board of Education* was that these children were getting an inferior education because they were getting a segregated education.

But what is also in the *Hempstead* case is the inferiority of the separate facilities and the unequal facilities that [fol. 246] exist in these various schools that are involved here, and Judge Dooling in *Branche v. Hempstead* said that the constitutional question involved here is the inadequacy of a segregated education, which is the real point in the *Hempstead* case.

In so far as the *Taylor* case is concerned, Judge Kaufman found in the District Court—and this case went before the Circuit Court of Appeals, in which you wrote your dissent; Judge Moore—Judge Kaufman had found that the Board of Education of New Rochelle had deliberately drawn the lines. That was the evidence that came before the Circuit Court, that there had been an intentional drawing of these lines so as to contain the Negro children in the Lincoln school.

Judge Feinberg: Isn't that the contention here?

Mr. Sandifer: That is the contention here, Judge Feinberg. But the whole fallacy in the position of the plaintiffs here is that they have reached out and quoted a lot of landmark cases here that don't stand for the proposition that is the proof that has been adduced in this case. There [fol. 247] simply has not been the proof to apply to the cases that they have cited, and therefore we don't feel that these cases are going to help them at all in this lawsuit.

Thank you.

ARGUMENT BY MR. SEAVEY

Mr. Seavey: May it please the Court, I find that my discussion will be rather brief, because I feel that my views have been adequately set forth as to the legislative and constitutional questions in the briefs on behalf of the intervenors.

As that brief indicates, I personally, as some of my colleagues, have had difficulty in coming to grips with this case,

because we find here on the facts that this is not a constitutional case, that on the facts neither the Fourteenth Amendment nor the Fifteenth Amendment questions which appear [fol. 248] to be raised by the allegations of the complaint have been factually proved here.

Absent this, I think that we just fall into the usual pattern of *Wood v. Bloom* and *Colegrove v. Green*.

For example, in trying to pull this case in by its heels into the question of segregation, discrimination, Negroes and whites, nobody, not the defendants and not the plaintiffs, not this Court, not even our brief has suggested that there are 700,000 white people living on the Island of Manhattan, who have not been included in the 17th Congressional District. Nobody has raised the banner for these people. We look only in the polarized eyes of the plaintiffs toward the Negro situation.

The Court will find in inspecting the cases from *Plessy v. Ferguson* on down to *Branche v. Board of Education*, that every case involving the Fourteenth and Fifteenth Amendments has shown that the persons who are complaining of injury were Negroes and only Negroes; and the facts so justified as they did in *Gomillion*, where you had every single voter except four who were of the Negro race eliminated [fol. 249] from Tuskegee.

Therefore, just taking this very quick view, the Court will find on this basis alone that the case is immediately distinguishable from every case which was ever presented to a Federal Court on the basis of race.

We have another question, too, before we get to the constitutional question, because I feel that Courts should avoid constitutional questions and interpretations thereof if there are ways to decide the case on the facts before you reach the constitutional questions.

This is why I am somewhat disturbed, very candidly, by the ready admission of my brother, Mr. Sandifer, to Judge Feinberg's question of whether or not if there was discrimination in the drawing of the 17th Congressional District, this ipso facto and per se would be unconstitutional. I am disturbed, because we never reached that point in this case.

Moreover, I don't believe that we can take a question of that sort just in a vacuum. I think that you must look at

the entire picture. You must find out whether it is deliberate, whether there is injury, whether there has been large [fol. 250] and invidious discrimination and not just a de facto situation.

Had the question been presented to me, I would have answered it in such a light, that I cannot imagine a Court on the Island of Manhattan or in the State of New York ever finding as a fact, at least not under the evidence that we have, that the Legislature of the State of New York deliberately and purposely divided Congressional districts on a racial basis. I think there would always be other factors which the plaintiff has failed to discuss. For example, in our factual situation we run across the question of who has to prove what about which, and it is our position that the plaintiffs, having assailed the constitutionality of Chapter 980 of the laws of the State of New York, carried the brunt of, one, going forward with the evidence, and, two, by a preponderance of the evidence proving their case.

To this end, the brief and the argument of the plaintiff have been entirely devoid of the fact that a properly passed statute of the State of New York is prima facie constitutional. This being so, and since they are assailing the statute, [fol. 251] they had the burden of eliminating all the reasonable hypotheses of innocence or of establishing guilt.

They had the burden, not us. They had to come forward and show that the reasonable hypotheses which may support the constitutionality of Chapter 980 have been eliminated, and they have utterly failed to meet the burden.

In fact, they say the burden was upon us to show what was in the minds of the Legislature. This is not the case.

Now, during the course of the hearings and the taking of the evidence, Judge Moore from the bench suggested a rational basis other than race, color or creed.

That rational basis was the voting record, the type of registration, the number of persons who vote in various districts.

As long as the plaintiff has speculated on what we know as the plaintiffs' hypotheses, I should say that I am somewhat disturbed that they did not discuss the Seavey hypotheses which were presented on cross-examination the last time this Court met.

I should dare to venture also that if the plaintiffs had [fol. 252] brought in the evidence which was suggested to them from the bench, they may have found a political situation which readily would have justified the drawing of the district as it is.

In fact, I might go so far as to venture, if a Republican were not in office in the 17th Congressional District, this case would not have been brought.

In discussing the facts, also, I think that sometimes large constitutional questions may tend to pivot on small isolated factors. Therefore, I do hope that Mr. Feldman will excuse me if I point out certain misstatements of fact, inadvertent though they were, so that the Court has as clear a record as can be presented from the argument.

Part of Mr. Feldman's argument and the plaintiffs' argument is that the Island of Manhattan and the Congressional districts contained therein are a self-contained island geographical unit. But this is not so as a fact. It so happens that in the 20th Congressional District the northernmost border goes over to what we would normally consider the Bronx. It crosses over the Harlem River, where the Harlem [fol. 253] River joins the Hudson River.

It does not show on the map, but this is so, and the Court can find it by reading a description of the 20th Congressional District.

In the Borough of the Bronx it is contiguous with one or two other Congressional districts.

So that if the plaintiffs had their way and the Legislature did, after a finding of unconstitutionality by this Court, reconstitute the districts, they would have the problem presented to them of what to do with the northernmost border of the 20th Congressional District, because it involves other districts in the Bronx, which necessarily involve more and more districts, until all 41 districts are involved here.

The point I want to make here is that part of the plaintiffs' argument is based on the alleged racial imbalance purportedly found in the 17th Congressional District. They would be satisfied, as I take it, if the Legislature reconvened and put into the 17th Congressional District sufficient Negroes and non-white persons to bring the 17th

Congressional District up to a voting parity with the other districts just on the Island of Manhattan. If the Legislature did so and put persons into the 17th Congressional District just because they were Negroes, I should venture to guess there would be a half a dozen lawsuits because these persons were singled out solely because of their color to be gerrymandered into a district which they theretofore were not in.

We then would have a racial question. The racial question would be presented by the so-called solution of the plaintiffs in this case.

In discussing the burden of proof both from the standpoint of who must go forward with it and who must eventually sustain the burden, the plaintiffs have relied on *Texas vs. Hernandez* and cases related thereto. These cases in no wise hold that the burden is shifted. They merely hold by a clear showing of exclusion when the statute does not contain an exclusion, but by persons acting in an exclusionary way, saying that Negroes cannot sit as jurors and showing that in a hundred per cent of the cases that Negroes were not allowed to sit as jurors in a certain county in Texas—they sustained the burden of going forward with the proof. That is not the case here, for obvious reasons.

[fol. 255] Then, in order to keep as nearly as possible within the time limit I voluntarily allowed myself I say at the very most what we have here is the penumbra of a racial situation. More importantly, this is a political case. This is a political thicket. This is a de facto case without injury being shown to anyone, not to the whites and not to the Negroes.

I urge this Court, on the basis, on the factual basis, to deny the use of its equitable powers here, without ever touching the constitutional questions, because they are entirely too involved, based on the slim state of facts we have presented.

Thank you.

Judge Moore: Mr. Galt?

ARGUMENT BY MR. GALT

Mr. Galt: May it please the Court, to begin with I should like to comply with the request from Judge Moore. I was asked, in addition to other material obtained, to obtain the official indication of the reduction of congressional districts in the State of New York under the last redistricting from forty-three to forty-one Congressmen.

I have here, which I obtained from Washington, three copies, and I have given copies to each of the chief counsel [fol. 256] for the other parties, of a House document No. 46 of the 87th Congress, first session, entitled "Statement Relating to the Eighteenth Decennial Census of the Population," published by the U. S. Government Printing Office.

Table I embodies the material in which I think the Court is interested.

The entire tract is prefaced by a message from the President, I believe dated early in 1961, to the Congress.

Judge Moore: Just for identification purposes, let us receive this as an exhibit in evidence, and such portions as may be relevant to the position of any party may be taken from this document.

Mr. Galt: Whatever procedure your Honors wish to follow, sir.

(Received in evidence and marked Defendants' Exhibit B.)

Judge Moore: While we are marking papers, I think that we might as well get the maps, too, that I requested be supplied. The parties will remember that I made a request in open court about a week ago that some maps be supplied showing the various congressional changes from 1911 to date. The Attorney General has sent large copies and then, [fol. 257] I think, has given to everyone reductions here.

Again I suggest that it would be wise to have them marked as exhibits, and then reference may be made to the photostatic reductions.

I also suggest that we use the chronological order starting with 1911 and then marking each year down to 1961; in order.

Mr. Feldman: I have no objection, sir, but I think '51 and '61 are duplicatory of plaintiffs' exhibits.

Judge Moore: I think so, too, Mr. Feldman, but even though they be duplicates, because of the figures on them, why don't we take them and then, as they are marked, if you will call our attention to the number previously given to '51 and '61, I will endorse that on at the same time.
[fol. 258] The first one is what? 1911.

(Received in evidence and marked Defendants' Exhibit C.)

(Received in evidence and marked Defendants' Exhibit D.)

(Received in evidence and marked Defendants' Exhibit E.)

(Received in evidence and marked Defendants' Exhibit F.)

(Received in evidence and marked Defendants' Exhibit G.)

Judge Moore: Gentlemen, do you remember what number G has as a plaintiffs' exhibit?

Mr. Feldman: 2-A, sir.

(Received in evidence and marked Defendants' Exhibit H.)

Mr. Feldman: That would be 2-B.

Judge Moore: Now that we are topographically oriented, Mr. Galt, you may proceed.

Mr. Galt: Yes, sir.

There was some slight discussion going back here among counsel as to a portion of some of these exhibits, which is across the river at the very north end. That is Marble [fol. 259] Hill, and despite the fact that physically it is not actually contiguous to the rest of Manhattan, it is part of Manhattan, and historically, of course, as these exhibits show, other boroughs like the Bronx and Richmond were taken in to some extent in congressional districts of the past.

Now, may it please the Court, I thought that due to a recent experience with a somewhat related case I had become inured to what I regarded at least as a somewhat strange series of burdens of proof, particularly as applied to constitutional questions of this nature. Despite that, I find myself even more intrigued and somewhat at a loss to account for what seems to be plaintiffs' theory as to proof and burden of proof in this case.

I think this whole case of the plaintiffs can be synthesized and summarized along three or four principal lines.

They have started to meet this burden—and I need not emphasize to this Court that it is an exceedingly heavy burden—of showing unconstitutionality, simply by presenting evidence along three or four lines.

First, they attempt to meet the burden by showing—and this is all, at the most, that they have shown, giving them [fol. 260] credit as much as the record will possibly bear—they have shown that there are ethnic disparities among districts. They have shown—and these are facts, of course, which without their proof would have been obvious to the Court; they are so well known as almost to be a matter of historical record for some time—they have shown what they call over-representation of the 17th District, a disparity of numbers as compared with other districts, and no marked disparity at that.

They have shown that the districts, particularly District 17, are not characterized throughout by straight lines.

Finally, the not at all surprising information that in setting up the district, the district does not necessarily follow—in fact, it frequently disregards full census tracts. It does not follow the full census tracts, and for that matter I would like to know how many districts, either in the State of New York or elsewhere, do.

But apart from all that, to me the intriguing thing is the plaintiffs' confident suggestion that this and this alone, this showing, this very skimpy showing, a mere restate-[fol. 261] ment with refinements of fact that the Court was fully aware of—that this shifts to us, to the defendants, the burden of proof of going forward and demonstrating the rationality, the reasonableness, the justification, the constitutionality of these districts, and presumably any other districts within the State of New York.

I know of no authority whatever—I know of no logical or reasonable principle which would thus easily and readily and on so bare a showing shift the burden to us.

And to support this suggestion, the prop they use, as I understand their latest brief, is that the alternative bases to the theory they have suggested are matters within the defendants' peculiar knowledge, which we should go forward and tell the Court about.

Well, of course, as to Governor Rockefeller, I need not elaborate on this. He does not even belong in the case.

As to the Attorney General and the Secretary of State, I know of no reason in law or in fact to suggest that they should have any special knowledge of these conditions which would require them, officers charged with electoral duties and who for that reason are joined as defendants, to go [fol. 262] forward with such proof. It seems to me that far from claiming any knowledge we defendants, unlike the plaintiffs, don't claim to have such knowledge. The only one who seems to know anything about legislative intent or claims to know anything about it are the plaintiffs.

Now, I don't know what the great difficulties are. The factors that go into a rational, normal, commonplace districting are well known enough. They are obvious enough, and I think it is a truism that does not require any elaboration or exposition that these well-known factors, some of which are alluded to, I think, at page 12 of our memorandum—the intervenors have many, too—transportation, economic conditions, the way business and commercial districts are set up, the composition of a particular area and things of that nature, which could be gone into at great length—these things rarely, if ever, translate themselves into congressional or other type of legislative districts—it could be Assembly, Senatorial or anything else—which ran along straight lines, census tracts or anything else. These are the real factors and not the artificial factors. One does not take a map of a great county like New York and lay down arbitrary lines. These are congressional districts.

[fol. 263] There are over a million people residing in this county, people with real interests, real activities, real commerce, real problems, sometimes differing essentially in one area from those of another, and these are the things

which normally, reasonably and properly would be taken into consideration by those charged by law with doing the redistricting.

Anyone can come in here and play guessing games, second-guess the Legislature or anyone else in the drawing of district lines throughout the State. That is what the plaintiffs' case really is. But it is another thing to deal with the real problems, and in a moment, when we go to these exhibits, we will see what the Legislature has done, beyond peradventure of a doubt—and nothing in plaintiffs' case indicates otherwise—is so commonplace, so normal, so realistic, so obvious that to suspect unconstitutionality from this commonplace would be to overturn every principle of constitutional law which I have ever encountered.

Now, wouldn't it be possible, not only within the State of New York but all over the country, in individual congressional districts or congressional districts planned out [fol. 264] in entire states, practically without exception, if the plaintiffs' theory were correct or proper—it would be the simplest thing in the world to make out a *prima facie* case against virtually every state in the Union when it comes to the matter of congressional redistricting, and this simple a burden, when it comes to so grave a question as the constitutionality of a state law, particularly one under which people are represented, under which people live, under which people will go forward, under which governments will act—this cannot be and will not be, I am certain, accepted by any court.

What is startling, what is unusual about disparities in the various ethnic compositions which the plaintiffs, and even to some extent ourselves, in cross-examination, have indicated to the Court? The Court knows very well what living conditions are in New York County and elsewhere in the state and in the nation. It is a fact of life, a very apparent fact of life that there are at this day and age concentrations of people in ethnic and other groups in one section of the city or another, in one section of the state or another. There is nothing unusual, unexpected, novel about this; and certainly the fact that this exists is nothing which [fol. 265] in and of itself should give cause even for the remotest suspicion of possible unconstitutionality.

I am rather amused by the fact that these hypothetical exhibits—and they certainly are hypothetical—I think the exhibit is very well named—we could draw thousands of these for the Court. We would not waste the Court's time, but even in their own hypothetical exhibits—I thought it was rather interesting despite their self-serving character—that they have in one of their exhibits—I can't readily identify it for the Court, but the record will show it—they have one non-white and Puerto Rican percentage of nine per cent or nine and a half per cent, and somewhere else, in one of the other districts in this A, B or C great hypothetical alternative, 56 or 57 or 55 or 58 per cent of the same ethnic composition, and what all of this proves or what all of this will do other than to enmesh the Court in a hopeless tangle of possibilities, I honestly cannot see. But it is, I think, worth commenting on, that if this is their standard of what they call segregation, there is something wrong, then, with the entire argument that they have been making in this case.

Now, I think it is clear that what has happened with the [fol. 266] 17th District right on down the line is something not at all abnormal and not at all in the direction of the improper motivation which the plaintiffs, despite their continual disclaimers as to exploring the legislative motive, have been doing nothing else but exploring throughout the entire case.

Actually, in 1911, the present 17th District did not have its forerunner in what was then the 17th District. I don't want to quarrel with plaintiffs' counsel. I leave it to the Court, its own perusal of these maps to determine what is the fact.

The present 17th District—and I think this is accurate—the present 17th District really has its genesis in the 1917 Amendments, and, incidentally, I may say to your Honors that all the way from 1911 to 1941, for whatever the reason, there was no substantial congressional redistricting in the State of New York. You simply had amendments in '17 and '22 which affected somewhat the districts in New York County and possibly elsewhere, but, no real districting on a large scale or full scale took place until 1941. And down the years there has been a historical basis for what has happened with the 17th.

[fol. 267] There isn't any real basic difference between the 17th District in the Chapter 980 laws of 1961 composition and the 1941 district. All that your Honors have to do is to look at the maps, including the predecessors to even the 1941 district.

In 1941, the district assumed its somewhat basic present shape, very largely its present shape. In 1951 there were some changes. But what counsel is pleased constantly to refer to as a jigsaw up at the top—and I would not so characterize it, but I will use his characterization—these and other typical matters I think appear even in the 1941 redistricting.

Your Honors will find that the general contours that typify the 17th District were present even in 1941. Look down there at the southwest corner. That is the same. The steps or the so-called jigsaw, essentially the same.

The basic character of the district was long ago molded and was simply continued by the Legislature, 1941, 1951 and on. And what happened in 1961? Here, I think, it is almost amusing to bring in the Gomillion case, as plaintiffs do, but what happened in 1961 actually? Here the State of [fol. 268] New York was required—no one disputes this—to reduce Congressmen from forty-three to forty-one, to change from six districts to four districts in the County of New York. And what they did was to enlarge the 17th in the simplest possible fashion, with no sinister motives. All they did was to extend over to the east with minor changes, encompassing the Mt. Sinai situation, bringing over the steps to the north, take a good slice of territory to the east—nothing unnatural; nothing suspicious, nothing peculiar—and at the south take in 23,000 or 24,000 people, whatever the exact number as Stuyvesant Town may be, and it adjoins Peter Cooper, which was already in the district.

And that is about the sum and substance of it. What they wound up with was a district, when you view it, as you must not only in the narrow perspective of New York County because it is part of the State of New York—it is part of the Act, Chapter 960 or whatever it is, 940, of the

laws of 1961—but in relation to all of the other congressional districts under the 1961 Redistricting Act. It is very well within a reasonable range of population percentage.

Counsel does not argue about population in one sense [fol. 269] yet, typically, as he has done in this case, and he has done it very adroitly and skilfully, brings it in, so I must mention it.

Here the disparity from the normal district is only some six, seven per cent, I think some seven-odd per cent, if my recollection serves me correctly. The largest district in Manhattan under the redistricting, some nine per cent from the normal average throughout the state.

And I may tell the Court at this point that there isn't any question but that the State of New York voluntarily imposes upon itself standards which went out at least as far back as 1929, when the present Section 2, Title 2, Section 2 or 2(a) was enacted, which does not have reference to contiguity and compactness, and there are no references to standards of population among at least the larger states of the United States.

I say without any fear of contradiction that New York State is by far the best from a voluntarily imposed standard point of view of any large state in the Union, perhaps of all states in the Union, because even if we were to apply the ten per cent standard, which some of the advocates of [fol. 270] close-population adherence have suggested to the Congress at various times, these districts in New York County all come within them very easily, and even proponents of such legislation, despite whatever their political affiliations may be, have said fifteen per cent or even twenty per cent. We come well within that.

So we come down to a situation where the entire case must rest—counsel has sought to rest it—on a prop which will never hold it up: desegregation and Gomillion.

I don't think I need to labor the Gomillion case at any length. Surely your Honors are very, very well acquainted with it. But I think I may at least say this in passing about Gomillion: there was no compulsion to redistrict in Gomillion, a compulsion such as we were under. We either had to redistrict or under the congressional statute had to have

our congressional candidates run at large throughout the state, and I need not tell the Court what that would be.

For the best interests of the people we have congressional redistricting, and we had to reduce the districts, and we reduced them here in New York County. How this can be tied in with a landmark case of an entirely different nature [fol. 271] like the Gomillon is beyond my comprehension. Gomillon is easy to distinguish and differentiate. Gomillon was and could have had only one purpose. It was apparent; the case reeked with it; and that was the purpose, the obvious purpose, the superficially obvious purpose, to discriminate. We don't have the superficially obvious discriminatory purpose here.

There are thousands and thousands of things which the Court might take into consideration which far more than counterbalance anything that plaintiffs have suggested, even if you give it the strongest possible inference. I mention offhand, for instance: Has counsel taken a look at the rest of the state and the rest of the statute which he says can be carved out piecemeal?

I don't know myself, but I wouldn't be surprised if, say, in the Bedford-Stuyvesant area, which has an entirely different concentration of population, entirely different things might happen, and if we are to impugn, as plaintiffs have been doing right along, the legislative intention, whether he abjures it or not, what happens with our Legislature? When does it discriminate along racial lines in one area and not in another?

[fol. 272] All of this tends to highlight what I consider the ridiculous prop on which this case rests, and that prop can and should be kicked out very readily.

Another thing, anent this legislative motive situation—and plaintiffs can say anything they wish, but basically this record shows that it is an attack on legislative motive; and this flimsy prima facie case is supposed to make us go forward with our proof. Do we have a district that is located partly here and separated and located partly there? Not that it would be invalid in the State of New York, but where you have contiguous and relatively compact districts such as you have here, how in the name of common sense can such an assertion be made?

There are many other things that might be said. I might, for instance, at random tell your Honors—and this is easily subject to verification, and this is ante litem motive—no, I think this happened only recently, but certainly I found out about it only recently: the testimony of Richard Scanlon, the director of the Bureau of the Census, testifying about the Subcommittee No. 3 of the House Judiciary Committee, testifying on a census bill which would allow the district to redistrict where it had failed to redistrict.

[fol. 273] Among other things he said on pages 126 and 127 that it would have to meet the fifteen per cent plus or minus, or whatever other figure was given. It would have to have a certain measure of homogeneity—and I underscore, myself, the word “homogeneity,” because it has terrific application to this situation as well as to other situations in redistricting.

He continues to say that—this is just as a personal judgment—this is not the law—but “I think it would be unfair to lump together two areas of disparate interests one with the other.”

Skiping over to something else he said, I think at page 127:

“What I was trying to say was that in putting together districts, if we are required to do so, I would certainly feel that among the criteria would be social, ethnic and economic characteristics of a district.”

Now, coming back to the situation here, what would plaintiffs have this Court or the Legislature do? Incidentally, I think that the unnamed defendants in this case are the Legislature, the members of the Legislature of the State of [fol. 274] New York. What would they have either the Court or the Legislature do? If there is any logic to their theory at all, if the motivation which they ascribe to the Legislature were the motivation which resulted in this redistricting, wouldn't the Legislature feel required to act affirmatively along lines such as the plaintiffs suggest throughout the state? Wouldn't legislatures all over the country be required to do that?

Legislative redistricting is difficult, complicated, complex enough without introducing into these myriad factors, these

quagmires, these things which would satisfy no one, when there is a complete innocence of motive in that regard.

Judge Murphy: May I interrupt? Where can I find what the Legislature did in redistricting, either now or back in 1951 or back in 1911 or 1862? Could I find anything at all on what factors they considered? Were there any hearings at all, say, in the last sixty years, in the New York Legislature?

Mr. Galt: Your Honor, I honestly don't know for certain. I think that there are. I am quite certain—

Judge Murphy: Are we agreed that there were none in this 1961—

[fol. 275] Mr. Galt: There may or may not have been. I would not venture to say because I do not know and I would not want to represent anything of which I am not certain.

Judge Murphy: I thought that it was agreed that at least in 1961 it was passed in one day without any hearings.

Mr. Galt: That isn't agreeable to me, but I don't know. Let us assume that it was—

Judge Murphy: You are expanding on what the Legislatures do and how complex the job is and the different factors, and I was curious to know where I could read that.

Mr. Galt: I submit to your Honor that if you merely took the maps and saw what happened over a period of years or made reference to those situations in which legislative hearings may have been had and probably were had, that these factors would appear. They are well known to political scientists. They are well known to the areas of government.

Judge Murphy: Yes, I am familiar with the theories. I just want to know whether in practice they do anything with them.

Mr. Galt: In practice counsel would have us believe that [fol. 276] if it is true that there was an enactment in one day that in this case they focused on District 17 and on the Island of Manhattan to accomplish this sinister purpose.

Judge Murphy: Oh, no. I think counsel says that they did the whole state in one day.

Mr. Galt: That is right. And in doing the whole state that is precisely the point—in doing the whole state in one day they had to, as part of it, if counsel's theory is correct,

carry out their sinister design, when it is apparent from these exhibits that were just marked a while ago that all that has happened—and I don't say to your Honor that history alone will cure a constitutional defect; what I do say is that a consistent course of historical development, such as undoubtedly these maps do show, will certainly go far to negate, if it does not completely negate, the plaintiffs' theory as to what they consider to be the real motivation of the Legislature.

Judge Murphy: I think in 1911, when the district went between the two rivers—there is some indication that you were not quite right.

Mr. Galt: In 1911—I didn't follow what your Honor [fol. 277] said.

Judge Murphy: In 1911 I think the district went from the East River to the Hudson River.

Mr. Galt: The 17th?

Judge Murphy: Yes.

Mr. Galt: In 1911 the 17th was, I think, the 18th. I think this has its genesis, really, in the 1917-1918 Amendments. This is what I understand to be the fact. I leave that to your Honors' good judgment, but I will say that in 1911, under totally different circumstances—times change, people change, people move, concentrations of population shift—

Judge Murphy: That is what I want to read. I don't know where I can read all of that. It must be discussed somewhere.

Mr. Galt: A discussion of the changes of district? Yes.

Judge Murphy: No. What induced the Legislature at the various hearings where they did the redistricting. There must have been some testimony given explaining why it had to be changed, and so forth.

I gather that there isn't any such thing.

Mr. Galt: I can't point to any at the moment. If I may [fol. 278] have the Court's permission subsequent to the argument, should I find any I will be very glad to transmit it to your Honor.

Judge Murphy: I would certainly like to see that.

Mr. Galt: It may be that I am at fault, and if I can aid the Court subsequent to the argument, I will be glad to.

I want to point out one other thing that strikes me as very, very remarkable about this case. We are told by counsel that we can piecemeal tear out of the statute one, two, three or four districts in the county of Manhattan without disturbing the rest of the statute.

I don't want to quibble about it but certainly things seem obvious enough to me right off: when you even venture to suggest such a theory.

First of all, it is part of one composite act. The Legislature, as the history of these exhibits shows, has the right, if it wishes, to take in areas of the Bronx or Staten Island. I would suggest, for example, as your Honors well know, the communities at Fordham Road and 207th Street.

Fordham Road, being in the Bronx and separated by [fol. 279] the Harlem or East River, with a bridge from 207th Street, might have a certain common interest that might be lacking in certain areas wholly within the County of New York.

But more than that, there are other things that strike me with reference to this theory: counsel says that the Court, in the exercise of its equity powers, should have Congressmen running at large in the County of New York.

Now, apart from all the drawbacks of running at large either in a county or throughout New York State, of course, this is a brand-new theory. I don't doubt the extent and the elasticity of this Court's equity powers when it is appropriate to exercise them, but I do say that there is nothing known to the law in the way of Congressmen running at large in a county. But if it could be done, what would happen? This would immediately backfire on counsel's suggestion. He himself says that there is a three-to-two or six-to-four ratio of whites to non-whites in the County of New York.

Under that, if people vote as counsel seems to suggest, according to race and color—and perhaps they do to some extent—I make no pretense at knowing, scientifically or [fol. 280] otherwise—but under those circumstances there would be presumably four white Congressmen elected in the County of New York, and how the deprivation of a Congressman which might otherwise be had, would help the cause of segregation or desegregation, issues of desegregation or integration, I cannot possibly see.

Finally, what strikes me is this: I think it is fundamental and elementary in any constitutional case of this kind that two things must be shown, neither of which plaintiffs by any stretch of the imagination can show. One is unconstitutionality or a strong, presumptive showing of unconstitutionality—far, far from attained here. This is no Gomillion case by any stretch of the imagination. They must show unconstitutionality and they must show also that there is a basis on the other side, on the factual side of their case.

They talk about segregation. Well, we understand from the constitutional principles that segregation in schools, where segregation in fact and in law exists, in the use of facilities that are shared or are supposed to be shared in common by the public, buses, transportation facilities, play-[fol. 281] grounds, parks, things of that nature—these are constantly used or are supposed to be used by the people in common.

But how does a voting district fit into this pattern? It does not fit, it seems to me, at all. A voting district is created for the purpose of voting once or twice in a year, in a primary or election, in an election district or assembly district or any other kind of district. There is no detriment, no psychological detriment such as you have in education by maintaining segregated schools. There is no lack of equal facilities. All this talk about dilution of voting is something mathematical, which I am too unschooled and unskilled to really follow, but I think it is mathematical and statistical talk, just a showing of statistics which we have here and nothing more, which can be interpreted in a thousand different ways.

But here there is no application for the principle of segregation.

I dare say to the Court that had the Legislature moved this boundary north for any reasonably great distance, let us say to 120th or 125th Street, we would be confronted with another and perhaps much more valid suit than this, [fol. 282] and that would be from the people who have shown their reaction in this case.

One of the two elements that you have to have in a case of this kind besides the question of a strong showing of unconstitutionality is the question of injury. Where is the

injury! Far from any injury, the natural reaction of these intervenors shows that the people who normally would react, rightly and loudly, if in fact their rights were impinged upon, come in here contesting the plaintiffs' case no less vigorously than do we.

So I say to your Honors, without exercising this situation at any great length, can we imagine a situation carrying forward the plaintiffs' theory, if it had any merit to it at all? Why stop at congressional districts? We have assembly districts. We have senate districts. We have towns, we have counties, we have villages, we have sanitation districts, sewer, water districts, fire districts, and an infinite number of districts in which people all over the state, pinpointed in one place or another, vote. If we had to carry forward this sort of thing not only would we be moving people around physically from one part of the state to the other, but we would be having districts where one part of the district is here and one part somewhere else. We [fol. 283] would have the most unusual geometric and human effects ever seen.

I need only ask the Court to refer to the rest of the arguments in our briefs. I think enough has been said in this case to demonstrate that this case is made out of tissue paper. There is no substance to it whatever and I respectfully submit that on the merits this complaint can be given no other treatment but dismissal, full dismissal on the merits.

Thank you.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Feinberg: Mr. Galt, on this question of injury, which you alluded to at the end: If it were shown—and I am not suggesting that it has been—but if it were shown that the districts were drawn on racial lines, are you contending that you would have to show more than that, that that would be constitutional?

Mr. Galt: Your Honor, I may not think as quickly as do my colleagues on either side. I don't think I could give you an honest answer to that unless I knew all the facts surrounding the case.

I would say that it is possible that it might move in the direction of superficially obvious discriminatory purpose [fol. 284] that would be the very least that is necessary, but I think that it would have to have a much more detailed recital than that for me to be able to give an honest answer to the Court.

I don't think I can answer that and I will not attempt to answer it other than to say possibly it might under some circumstances.

REPLY BY MR. FELDMAN

Mr. Feldman: May I be permitted a brief reply, sir?

Judge Moore: Yes, but try to make it brief.

Mr. Feldman: I will keep in mind the hour, yes.

First with respect to Judge Murphy's question, sir, I can state categorically, having researched the question, that there were no hearings on this 1961 redistricting law. There was a report of the joint legislative committee on reapportionment which preceded by one day the enactment of the statute, and it is contained in the McKinney session laws for November 25, 1961.

Judge Murphy: And I suppose in each prior redistricting there was a similar report, would you guess?

Mr. Feldman: There was in '51, sir. I am not familiar [fol. 285] with the periods prior to that. But I am also familiar with the fact that in this report the committee said that it was the conclusion of the committee that the most important standard is essential equality of population.

With respect to Mr. Galt's argument at the end that had the Legislature moved the district north they might have been subject to the charge that was made by the intervenors here that they would be diluting voting strength, I wonder if Mr. Galt is suggesting that that is the reason that they didn't do it, because I suggest that if that is the reason, it would have been racially motivated.

But be that as it may, without going into this question of motivation, let us just talk about Mr. Galt's suggestion for homogeneity for the moment.

I find this an interesting argument in view of our being confronted with an undersized district, since we noticed that as we go through the tracts on the western border, for instance, there is a certain homogeneity of the tract. But in every instance except one, the number of Negroes and Puerto Ricans outside the border is less than the number of Negroes and Puerto Ricans inside the border—excuse [fol. 286] me, just the reverse—the number of Negroes and Puerto Ricans outside the border is greater than the number of Negroes and Puerto Ricans inside the border, and I don't see, if they were trying to equalize the districts and straighten the lines, that there would have been any destruction of homogeneity in that area.

Mr. Galt describes the Bedford-Stuyvesant area ingenuously because he knows that it was redistricted very differently. It has a concentration of 400,000 Negroes and Puerto Ricans in a very small area, and there is no district in Brooklyn with as much as thirty or forty per cent Negroes and Puerto Ricans.

I don't know if it was accidental in that case—I would hope so—that the lines in Brooklyn are drawn without relation to racial lines.

The Bedford-Stuyvesant area, although a compact area, lies in not one but four congressional districts in Brooklyn.

Now, when he says that all the Legislature did when it added the areas in the east, in Stuyvesantown, was to enlarge the district, and it had to enlarge the district because we went from six to four Congressmen. We simply asked [fol. 287] them why didn't they enlarge it enough. Why didn't they enlarge it to make it reasonably equal?

Mr. Galt suggests that one of the hypothetical alternatives contained a district of nine per cent Negroes and Puerto Ricans. That doesn't make any difference to us, whether it would have been nine per cent or twelve per cent. The fact remains that those district lines were suggested without regard to race or creed or color or ethnic origin. They were drawn on the basis of population and where they lived, and the way those figures came out is the way they came out, and I merely suggested to the Court, and we continue to suggest to the Court, that you could not have a district such as we do have in the 17th and

such as we do have in the 18th unless those districts were drawn with regard to race, and that this is the only evidence we have of legislative motivation.

As far as shifting the burden of proof is concerned, Mr. Galt suggests that there were many, many possible alternatives that could have been demonstrated, and I ask the Court to note why have they not demonstrated one, just one, whether it be political, economic, neighborhood, social — any one of the myriad of suggestions contained in the [fol. 288] intervenors' brief or in his brief or in his argument.

Why not show the existence of one rational basis? Surely it is not because they don't take this lawsuit that seriously. Surely they don't think it is because we have presented no proof at all. Surely it is not because they are content as a defendant entitled to take the Fifth Amendment not to take the witness stand because the jury can make no implication from their failure to take the witness stand. Why have they not come forward with one?

They know why. They have explored them, I am sure. I know that Mr. Seavey and the intervenors have explored the other possibilities, but they have not come forward with one.

Whether it is a Republican Congressman or a Democratic Congressman in that district is immaterial. They know what the facts would show. They know that the Stuyvesant town area is predominantly democratic, and it was added, while the area dropped north of 97th Street was substantially Republican. The area dropped was Republican, but it was seventy-five per cent Negro. The area added was white, and it was seventy per cent Democratic.

We have considered these arguments irrelevant, but I [fol. 289] don't want them to try to mislead the Court into thinking that they just haven't wanted to dignify the case by coming forward with any rational alternatives. If your Honors please, there are none.

Now, in so far as Mr. Seavey's argument is concerned, first let me get one fact straight on this question of severability. Mr. Seavey reads the statute wrong and he understands the island's geography incorrectly, just as it is not Bank Avenue and Park Street. The geography makes it

clear that it is the Island of Manhattan that is included in the 20th Congressional District. It goes through the waters of the Harlem River as distinguished from the Harlem Ship Canal, and this little area in the 20th District that is north of the Harlem Ship Canal is south of the Harlem River, and it is no part of any of the four districts in Manhattan that go over to the Bronx.

Now let me just point out that on Mr. Sandifer's argument I found just a certain amount of schizophrenia, in his argument that *Branche vs. The Board of Education* is one of these de facto segregation cases, and that that is all you have to show, and that whereas the lines had been suggested in 1939 by the NAACP to avoid segregation, they now attack those lines successfully, because population shifts had created a de facto situation, even though there is no legislative intention, no de jure segregation.

He then couples that with the fact, the argument that we have failed to show an intention on the part of the Legislature.

All we have ever argued here is that there is a de facto case of segregation, that segregation in and of itself is harmful in that it violates constitutional rights and that the question of legislative intent is irrelevant, but to the extent that it becomes relevant only in determining whether it is rational, whether there is any other rational basis, you may derive certain facts from what the Legislature did, certain conclusions such as keeping the district under-sized and keeping it gerrymandered.

Now, I merely want to point out that this argument about harm, and distinguishing this case from *Gomillion* and distinguishing *Gomillion* from *Baker vs. Board of Education*, which brings both the intervenors and the defendants back to a completely outmoded argument and a completely outmoded position. They forget that the Supreme Court has said time and time and time again that separate is not [fol. 291] equal. Separate cannot be equal. The separate-but-equal doctrine has gone by the boards, if your Honors please, but otherwise I don't know on what basis they could justify a marbleized Negro or colored only men's room in an interstate facility, whereas the so-called white men's room may have been less fancy.

The fact is that separate is inherently unequal. Separate is constitutionally unequal, and they may not now take this position and urge that we must show some positive harm.

Also—and I may conclude on this—I merely want to point out to this Court that if Gomillion is to be forced into a narrow mold of saying that the only substance for the situation where you have put all the whites in one area save for four Negroes and all the Negroes save for these same four have gone into another area, you would be saying that Gomillion and segregated districting would apply only to these rural areas, because you cannot district in an urban area, so that you have eliminated all Negroes. You cannot district so that you have included only whites in an area. You are bound to have some numbers in both districts.

[fol. 292] But the question is the minimums and the maximums and if this Court were to uphold this districting it would be a green light to big-city segregation all over this country because they would always say, "You see, we haven't excluded all Negroes," or "We haven't fenced in all the whites." There is still this flop-over into other neighborhoods."

If your Honors please, that is impossible—it is impossible to get that kind of Gomillion segregation but I don't think to have it stand on all fours you have to be in the circumstances where they have excluded all but four. Maybe six would still be discrimination, and we think that all but three per cent is still discrimination.

Judge Moore: We will adjourn court. Decision will be reserved.

Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 293] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil 62-2601

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO,
BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all
individually and on behalf of all other persons simi-
larly situated, Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the State
of New York, CAROLINE K. SIMON, Secretary of State of
the State of New York, and DENIS J. MAHON, JAMES M.
POWER, JOHN R. CREWS and THOMAS MALLEE, Commis-
sioners of Elections constituting the Board of Elections
of the City of New York, Defendants,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONION
MENDEZ, Defendant-Intervenors.

Before: MOORE, C.J., and MURPHY and FEINBERG, D.JJ.

OPINION—November 26, 1962

[fol. 294] Justin N. Feldman, New York, N. Y.,
Jerome T. Orans, New York, N. Y., Leo M. Drachs-
ler, New York, N. Y., Edward T. Bloustein, New
York, N. Y., Bruce McM. Wright, New York,
N. Y. (James M. Edwards, New York, N. Y.,
Elsie Quinlan, New York, N. Y., George M. Cohen,
New York, N. Y., on the brief), for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State
of New York, Albany, N. Y., Irving Galt, Assistant
Solicitor General, and Sheldon Raab, Deputy As-
sistant Attorney General, of Counsel, for De-
fendants, Nelson A. Rockefeller, Louis J. Lefko-
witz, and Caroline K. Simon.

Leo A. Larkin, Corporation Counsel of the City of New York, Benjamin Offner, Assistant Corporation Counsel of the City of New York, of Counsel, for Defendants, Denis J. Mahon, James M. Power, John B. Crews and Thomas Mallee, Commissioners of the Board of Elections of the City of New York.

Jawn A. Sandifer, New York, N. Y., William C. Chance, Jr., New York, N. Y., Robert W. Seavey, New York, N. Y.; Morris Sterenbuch, New York, N. Y., for Defendant-Intervenors.

[fol. 295] MOORE, Circuit Judge:

Plaintiffs bring this action allegedly "to redress the deprivation, under color of the law of the State of New York, of rights, privileges and immunities secured to the plaintiffs under the Constitution and laws of the United States and to declare unconstitutional that portion of the State statute in question which deprives the plaintiffs of their rights, privileges and immunities". More specifically, they claim that the action arises under the Fourteenth and Fifteenth amendments of the Constitution of the United States, the Civil Rights Act (42 U.S.C. §§1983, 1988 and under 28 U.S.C. §§1343, 2201, 2202 and 2281). The relief sought is that a three-judge constitutional court hear and determine the case; that such portion of Chapter 980 of the 1961 Laws of New York as describes the boundaries of the 17th, 18th, 19th and 20th Congressional Districts be declared unconstitutional; that a preliminary injunction issue against the primary election on September 6, 1962¹ and the general election on November 6, 1962 on the basis of such boundaries; that a permanent injunction issue; that unless a redistricting of such four districts be made, there be an election at large in New York County for the four Congressional seats in said County; and that absent such legislative action, the court appoint a special master to redefine the boundaries of the four districts in question.

[fol. 296] The plaintiffs allege that they reside and are registered voters in these respective districts and that each brings the action on his own behalf and all other residents of the respective districts. They ask, because of their claim that they "fairly and adequately represent" these

¹ Request withdrawn during trial.

other registered voters, that this be considered a "class suit".

The portion of the statute (Chap. 980) under attack establishes, according to plaintiffs, "irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin". Plaintiffs charge that the 17th Congressional District was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin" and that the 18th, 19th and 20th districts "have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York". They also assert that the 17th is "over-represented" and the 18th, 19th and 20th are "under-represented".

This situation, plaintiffs say, has existed for many years, that there have been repeated and energetic efforts to seek legislative correction of the abridgement of plaintiffs' constitutional rights but that they have been of no avail "because of the existing unconstitutional apportionment of the Legislature of the State of New York"; that the Legislature in successive statutes has redrawn the district boundaries in accordance with shifts in non-white and Puerto [fol. 297] Rican populations and that the 17th has a population 12% less than the 18th, 15.4% less than the 19th and 14% less than the 20th. These allegations have been set forth at some length because of the necessity of ascertaining whether they have been established by the proof.

At the opening of the trial six individuals, Adam Clayton Powell, J. Raymond Jones, Lloyd E. Dickens, Hulan E. Jack, Mark Southall and Antonio Mendez, by counsel moved to intervene. They were represented to be duly enrolled members of the Democratic Party and district leaders of the area comprising the 11th, 12th, 13th and 14th Assembly Districts. Adam Clayton Powell, a Negro, is now serving as Congressman from the (pre-1961) 18th Congressional District. Intervention was granted. The intervenors thereupon served their answer as intervening defendants alleging six defenses which, amongst other matters, denied that plaintiffs represented the class to which the intervenors belong and that the redistricting of the four Congressional Districts in question deprived plaintiffs of their constitutional rights. As affirmative de-

fenses they alleged, in substance, that the test for Congressional representation is based on population rather than race, that the Republican-controlled Legislature drew the new district boundaries "along partisan political lines rather than racial lines" to "cut out as many democrats as they possibly could", that judgment as sought by plain-[fol. 298] tiffs would place in jeopardy the constitutional rights of Negroes and Puerto Ricans to representation in Congress, that a County-wide election at large would "deprive Negroes and Puerto Ricans and other minorities of fair representation and equal protection under the law", that this is not a proper class action, that "the real party in interest in this law suit is the Democratic County Committee of the County of New York", that said Committee of which intervenors are members never authorized or approved plaintiffs' action, and that plaintiffs are estopped from bringing this action because of their failure to commence it until some time after June 21, 1962 the initial date for nominating petitions.

On the trial, plaintiffs presented certain statistical material gathered from the 1960 census figures and various maps of Manhattan Island (New York County). At the request of the court, counsel for the Attorney-General submitted maps showing the many Congressional district changes since 1911. No proof was offered by any party that the specific boundaries created by Chapter 980 were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts. Plaintiffs rely entirely upon their analyses and version of certain statistics and would impute to the Legislature the inferences they draw therefrom.

[fol. 299] After the Eighteenth Decennial Census (1960) had been taken, the President according to law (2 U.S.C. 2a) transmitted to the Congress a statement under date of January 10, 1961 showing the number of persons in each State and "the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives by the method of equal proportions. The statement disclosed a total population of 179,323,175 for the United States and 16,782,304 for New York State. Apportioning the 435 Congressional

Representatives amongst the States, New York became entitled to 41 instead of the 43 previously allotted under the 1950 census.

As a result of this required change, the Joint Legislative Committee on Reapportionment submitted to the Second Extraordinary Session of the New York Legislature on November 9, 1961 its interim report wherein it stated the need for legislative action, namely, that because of the reduction in Congressional seats all the Representatives of the State would have to be elected at large "unless new districts not exceeding in number the number of Representatives apportioned to the state shall be created". The Committee briefly reviewed the history of the Congressional district system as follows:

In the early days of the Republic, some of the states elected by districts and some at large. The desire for local representation, however, gradually led to the adoption of the district method by the majority of the states. By 1842, of the states entitled to more than one Representative, 22 were electing their Representatives by districts, and only 6 were electing at large. [fol. 300] As the practice of electing by districts became firmly established, Congress, in connection with the succeeding apportionments of Representatives among the states, enacted statutes setting standards for the election of Representatives within the several states. In connection with each decennial census from 1840 to 1910, with the exception of the census of 1850, Congress enacted a law of this character. The last of these laws was the Act of August 8, 1911 (2 U.S.C.A. §2) (37 Stat. L. 13), which provided that districts should consist of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants. There was no apportionment Act after the census of 1920. The permanent act of June 18, 1929 (46 Stat. L. 13), as originally enacted and as amended by the Act of April 25, 1940 (2 U.S.C.A. §2a) (54 Stat. L. 162), contained no standards for the creation of districts. In *Wood against Broom*, 53 S.Ct. 1, 287 U. S. 1, 77 L. Ed. 131, a case involving the creation

of Congressional districts after the apportionment under the Act of 1929, the Supreme Court held that the provisions of the Act of 1911 requiring that districts be of contiguous and compact territory and, as nearly as practicable of equal population, applied only to districts to be formed under the Act of 1911. In *Colegrove against Green*, 66 S. Ct. 1198, 328 U.S. 549, 90 L. Ed. 1432, Plaintiffs urged that an act creating Congressional districts substantially unequal in population be held invalid as violating the Fourteenth Amendment of the Federal Constitution. In that case the Supreme Court in its opinion, after citing with approval *Wood against Broom*, *supra*, stated that it was not within the competence of the court to grant the relief asked by the Plaintiffs.

Since the above cases, various bills have been introduced in Congress to provide standards to be followed by the state legislatures in creating Congressional districts. None of those bills has been enacted into law. At the present time, therefore, there are no Federal standards binding upon the states in creating Congressional districts, and there are no such standards to be found in the Constitution or statutes of New York.

[fol. 301] The Committee then set forth the standards used by it in preparing its proposed bill, stating:

- In the absence of Federal and State constitutional and statutory standards governing the creation of Congressional districts, your Committee has been obliged to determine for itself what, if any, such standards should be adopted by it in the preparation of a bill to be recommended to your Honorable Bodies. It is the conclusion of your Committee that the most important standard is substantial equality of population. While exact equality of population is the ideal, it is an ideal that, for practical reasons, can never be attained. Some variation from it will always be necessary. The question arises as to what is a permissible fair variation.

Your Committee has examined reports of Committee hearings on bills introduced in Congress bearing upon this subject, and reports and publications of authorities on this subject. Variations of from ten to twenty per cent from average population per district have been suggested from time to time. After considerable study, your Committee decided that a maximum variation of fifteen per cent from average population per district, the variation recommended by the American Academy of Political Science and endorsed by former President Truman, would preserve substantial equality of population and permit consideration to be given to other important factors such as community of interest and the preservation of traditional associations. In addition to keeping the districts in its proposed bill within the maximum of the fifteen per cent variation from average population per district, your Committee has also created proposed districts of contiguous territory and has endeavored to preserve the several metropolitan areas of the state either in single districts or, where large populations made that impossible, in contiguous and closely allied districts.

[fol. 302] New York City was singled out for special comment as follows:

In an attempt to assist the members of the Legislature in their analysis of the consideration given Metropolitan New York by your Committee we would like to point out that the population of New York City according to the 1960 Federal decennial census is 7,781,984. 19 districts have been created in the City with an average population of 409,578 per district. The remainder of the state has a population of 9,000,400 and has 22 districts with an average population of 409,109 per district. The total population of the state is 16,782,384. Dividing this population by 41, the total number of Representatives, gives an average population per district throughout the State of 409,326. A mere inspection of these figures will demonstrate that

there has been no discrimination against New York City in the proposed bill.

Refining the population figures still further, it is obvious that New York County (Manhattan) with its population of 1,698,281 has approximately one-tenth of the total State population of 16,782,304 and, hence, should have on an equal proportion basis one-tenth of the 41 Congressional seats. This it has in being allotted four seats.

Plaintiffs do not question the necessity for the reduction of Congressional districts in the State from 43 to 41 nor the boundaries of the 37 districts outside of New York County. Inspection of these 37 districts discloses a variation in population within New York City of from 469,908 in the 12th District (Brooklyn) down to 349,850 in the 15th District (also Brooklyn) and 348,940 in the 24th District (Bronx); and in the upstate (in relation to New York [fol. 303] City) and rural areas of from 460,409 in the 30th District comprising the counties of Saratoga, Washington, Warren, Fulton, Hamilton, Essex, Clinton and part of Rensselaer to 353,183 in the 31st District consisting of St. Lawrence, Jefferson, Lewis, Franklin and Oswego counties. An example of a merger of rural and suburban interests is found in the 25th District where Putnam's (rural) population (31,722) is merged with part of Westchester's (largely suburban) 406,687. Separating the 19 New York City districts from the 22 in the rest of the State, if the 7,781,984 persons in New York City were equally divided amongst 19 districts, there should be 409,578 persons in each district. The remaining 9,000,000 persons divided into 22 districts should provide an average of 409,109 per district.

These figures are thus analyzed because plaintiffs frequently employ the words "under-represented" in relation to the size of the 18th, 19th and 20th districts, namely, 431,330, 445,175 and 439,456, respectively, and "over-represented" with respect to the 17th district (382,320). Testing these numbers by taking the Legislative Committee's "maximum variation of fifteen per cent from average population per district", the largest New York County district, the 18th, is less than 9% above the av-

erage and the smallest, the 17th, less than 7% below the average. Only in Kings County is found the widest range of almost 15% above and below the mean.²

[fol. 304] During the trial the court made every effort to ascertain the real basis of plaintiffs' claim of constitutional violation. Plaintiffs stated that they intended to prove that the Legislature in enacting Chapter 980 of the Laws of 1961 "segregated the voters [in Manhattan] by virtue of race and place of origin". They limit, however, their "race" to "non-white" and their "place of origin" group to Puerto Rico. Selecting certain catch phrases from one of the *Gomillion* opinions (Mr. Justice Whittaker), they argue that the Legislature intentionally fenced Negro citizens out of the 17th District and fenced them into the 18th, 19th and 20th Districts. They ask this court to find an unconstitutional Legislative intent solely on the basis of their analysis of the population content of these districts.

At the outset this court (and courts generally) should be ever watchful that it is not being made the pawn of warring political factions.³ More than suspicion of this

² As Mr. Justice Black pointed out in his dissent in *Colegrove v. Green*, 328 U. S. 349:

There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution.

³ In *Colegrove v. Green*, 328 U. S. 549, Mr. Justice Frankfurter wrote:

Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such ~~judicial~~ intervention in an essentially political contest be dressed up in the abstract phrases of the law.

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.

possibility is created by the pleadings. The intervenors assert that they are the six district leaders in Assembly Districts embraced within the Manhattan Congressional Districts and that the 18th District from which Congressman Powell is the present representative and others in "public office" would be affected by any judgment in favor of plaintiffs.

[fol. 305] Upon the trial no proof was offered which would justify a finding that plaintiffs represented a "class"; in fact, the intervenors' opposing claim dispels any such conclusion. Neither plaintiffs nor the intervenors can speak for, or truly represent the wishes of, some 400,000 persons in their districts. Each individual, however, is entitled to the benefits of constitutional equal protection and due process. But to receive judicial support for their respective causes, they must show more than a mere preference to be in some other district and associated for voting purposes with persons of other races or other countries of origin.

Plaintiffs' theories of unconstitutionality are difficult to pin down. First, they refer to disparity in size between the districts and have attempted in their own hypothetical districts to equalize almost exactly the population in each. They disclaim exact equality as a basis of unconstitutionality probably because of the history of 2 U.S.C. 2(a) and because of *Wood v. Broom*, 287 U.S. 1 (1932).

Although plaintiffs obliquely disavow the racial percentage theory, their statistical argument supports it. They show that of Manhattan's 1,698,281 inhabitants the 1960 census lists 1,058,589 or 62.3% as white (apparently all races and places of origin) and 639,692 or 37.7% as "non-white and Puerto Rican origin". Why the census so dis- [fol. 306] criminate, plaintiffs were unable to answer except as their witness said that the census limits races to non-whites and place of origin to Puerto Rico. Plaintiffs then show that of the four districts the percentages of non-whites and Puerto Rican are 3.1%, 58.2%, 19.8% and 18.9% in the 17th, 18th, 19th and 20th Districts, respectively. From these figures plaintiffs ask this court to conclude as a matter of law that the Legislature in 1961 drew

the district lines so as to intentionally deprive non-whites and Puerto Ricans of their constitutional rights: "Constitutional rights" to do what still remains unanswered. Plaintiffs apparently want a higher percentage of non-whites and Puerto Ricans in the 17th. Their neighbors, the intervenors, proclaim with equal vehemence that such a change would be violative of their rights to enjoy the re-districting as it now is. They claim, in effect, that to take a substantial number of non-whites and Puerto Ricans and to place them within the confines of a different Congressional district (namely, the 17th) would be an Acadia-like deportation designed to dissipate and thus make ineffectual their votes. They assert that they now have an opportunity to elect persons of their own race to represent them and their interests to legislative bodies. Plaintiffs respond that this is of no importance.

Finally and before considering the legal problems, if there be any, a brief review of New York County's congressional districts should be made. A 50-year period has been selected. In 1911 there were 9 full districts and parts [fol. 307] of 4 other districts in New York County out of a total of 43 in the State. In 1917 the 1911 apportionment was amended changing the County to 10 full districts and parts of 3 others. Based on the 1910 census, the variation in the Congressional Districts Nos. 11-22 was slight, ranging from 204,498 to 219,772. After the 1920 census applying the 1922 Act, the variation was larger, probably due to population shifts, the low (from available figures) being 191,645 and the high 317,803. Wider disparity developed after the 1930 census, the low being 90,671 and the high 381,212. After the 1940 census and the State was allotted 45 districts, New York County was given 6 full districts and part of one other, the population range being from 257,879 to 315,639. Not until after the 1950 census was New York County allotted self-contained districts, it receiving 6 out of 43 for the State, the smallest district having a census population of 316,434 and the largest 336,441.

This suit is but one of many throughout the country seeking to take advantage of the Supreme Court's decision

in *Baker v. Carr*, 369 U. S. 186 (1962).⁴ To inject a racial angle plaintiffs have added *Gomillion v. Lightfoot*, 364 U. S. 329 (1960), and the school segregation cases to support their thesis. However, the most drastic Procrustean

⁴ Of the cases upon the subject of apportionment which have come to my attention, four have held the existing state apportionment provisions constitutional:

- W.M.C.A., Inc. v. Simon*, Civil No. 1559, S.D. N.Y., Aug. 16, 1962 (Statutory Court);
- Wisconsin v. Zimmerman*, Civil No. 3540, W.D. Wisc., July 25, 1962 (Statutory Court) (report of Special Master);
- Caesar v. Williams*, 9 Idaho Capital Report 161 (Sup. Ct. April 3, 1962);
- Maryland Comm. for Fair Representation v. Tawes*, 31 U.S.L. Week 2155 (Md. Ct. App. Sept. 25, 1962) (upper house).

Others have found the apportionment statutes in conflict with the state constitution:

- Sims v. Frink*, 205 F. Supp. 245 (M.D. Ala. April 14, 1962) (Statutory Court);
- Harris v. Shanahan*, No. 90,476, Dist. Ct. Shawnee County, Kan., May 31, 1962;
- State ex rel. Lein v. Sathre*, 113 N.W. 2d 679 (Sup. Ct. N.D. Mar. 9, 1962);
- Lein v. Sathre*, 205 F. Supp. 536 (D.N.D. May 31, 1962) (Statutory Court);
- Mikell v. Rousseau*, No. 385, Sup. Ct. Chittenden County, Vt., May Term, 1962.

See also *Start v. Lawrence*, Equity No. 2536, 1962 Commonwealth No. 187, C.P. Dauphin County, Pa., June 13, 1962 (court refused to determine whether the apportionment statutes comported with the state and federal constitutions until the legislature had time to act).

Still others have held the apportionment provisions invalid under the equal protection clause of the Fourteenth Amendment:

- Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. April 28, 1962) (Statutory Court);
- Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. May 25, 1962) (Statutory Court);
- Moss v. Burkhart*, Civil No. 9130, W.D. Okla., June 19, 1962 (Statutory Court);
- Baker v. Carr*, 206 F. Supp. 341 (M.D. Tenn. June 22, 1962) (Statutory Court);
- Maryland Comm. for Fair Representation v. Tawes*, Equity No. 13920, Cir. Ct. Anne Arundel County, Md., May 24, 1962 (lower house);
- Scholle v. Hare*, Sup. Ct., Mich., July 18, 1962;
- Fortner v. Barnett*, No. 59965, Ch. Hinds County, Miss., 1962;

treatment will not conform the shape of the present case to the patterns of those cases. *Baker v. Carr* was simply a decision that a federal court has jurisdiction to deal with and remedy such a wide disparity in voting representation as to amount to a deprivation of due process and equal [fol. 308] protection. There the situation was particularly aggravated because the Tennessee Legislature had taken no action to comply with the state's own Constitution. A comparable hypothetical state of facts would exist had the New York Legislature taken no action since 1901 when New York County held a high percentage of the State's 37 seats whereas today the County's population is only one-tenth of the State's. But this factual situation of non-action does not exist. The Legislature has taken revising action after each census and at present the ratio of voter to Representative is, as the Legislative Committee has said, on a "substantial equality of population" basis.

The *Gomillion* case has no application whatsoever. There some 400 Negro residents of the city of Tuskegee who were entitled to all the privileges of city residents including voting were deliberately disenfranchised from such voting by a wholly irrational drawing of new city boundaries which did not even slightly veil the obvious purpose of excluding Negroes as city voters.

The school cases are equally irrelevant. If it is to be found as a fact that only in the 17th District is there and will there be throughout the years a Congressman who alone can properly speak for the electorate of Manhattan as their representative further consideration might be given to these cases. However, both major political parties would vigorously dispute a finding that a lone Congressman [fol. 309] from New York's 17th controls or vitally influences all actions by the Congress, no matter how able any such incumbent might be.

From various maps and figures plaintiffs ask this court to find constitutional deprivations. Actually plaintiffs have

Sweeney v. Nott, C.Q. No. 643, Sup. Ct., R.I., 1962;

Sims v. Frink, 208 F. Supp. 431 (M.D. Ala. 1962) (Statutory Court).

These cases for the most part involve wide disparity in the population of voting districts.

not even shown that their own voting status will be changed in any way. Prior to the reduction of New York County's Congressional seats to four, there were six districts, the 16th through 21st. In eliminating two, the Legislature apparently used the existing framework. It enlarged the 17th substantially on the north cutting into the old 18th and slightly on the south and it merged the balance of the old 18th with the 16th. The old 19th, 20th and 21st were made into two districts extending from the northerly part of Manhattan along the west side of the city around the southerly end of the island and up through the lower east side. Thus, the general district pattern was somewhat preserved despite the elimination of two districts.

No proof was tendered that the Legislature in drawing the district lines in previous years was motivated or influenced by any considerations which have become unconstitutional during subsequent years. Plaintiffs wholly failed to support their allegation of "repeated and energetic efforts" to seek legislative correction or that efforts were unavailing because of unconstitutional apportionment. Any challenge that correction if needed could not be made because of the composition of the State legislature is squarely met by the recent decision in *WMCA [fol. 310] Inc. et al. v. Simon et al.*, 61 Civ. 1559, S.D. N.Y., August 16, 1962, wherein after a trial a three-Judge court found with respect to the apportionment of Senate and Assembly districts that the apportionment provisions of the State of New York are rational, not arbitrary, are of substantially historical origin, contain no geographical discrimination, permit an electoral majority to alter or change the same and are not unconstitutional under the relevant decisions of the United States Supreme Court. Certainly federal congressional redistricting would not affect New York legislative action and plaintiffs in this action have not attacked New York's method of creating its own Legislature. Nor has any proof been offered to indicate in any way that the Legislature in its various congressional boundary enactments from 1901 to date has redrawn district lines in conformity with non-white and Puerto Rican population shifts.

This case presents an example of an attempt to apply theories of completely unrelated situations (*Baker v. Carr*, *Gomillion* and the school cases). That the effort appears forced is not surprising. If the Legislature had created two Congressional districts in Manhattan each consisting of 100,000 persons, one almost wholly of race A and the other of race B and assigning the balance of the County to two districts of 700,000 each, the question of discrimination might well be raised; but it did not so act.

[fol. 311] No citizen of Manhattan, as a result of the legislative redistricting, has been deprived of his right to vote for the duly nominated candidates of the party of his choice and in the area in which he resides. Wherever areas have to be divided into districts, there will be voters who may prefer to vote in districts other than their own but such deprivation is not a constitutional deprivation. In any large city it is not unusual to find that persons of the same race or place of origin have a tendency to settle together in various areas. Often this understandable practice enables them to obtain representation in legislative bodies which otherwise would be denied to them. Where geographic boundaries include such concentrations there will be a higher percentage of one race in one district than in others. To create districts based upon equal proportions of the various races inhabiting metropolitan areas would indeed be to indulge in practices verging upon the unconstitutional. Equally unconstitutional would appear to be plaintiffs' suggestion that only in Manhattan should there be an election at large of its four Congressional Representatives and that the district system be used elsewhere in the State. Any such legislation would definitely tend to abridge the voting status, if not the actual voting rights, of residents of Manhattan.

Plaintiffs having failed upon the facts and the law to establish any violation of their constitutional rights as a result of the action of the New York Legislature in enacting [fol. 312] Chapter 980 of the Laws of 1961, the complaint must be dismissed. No costs.

Leonard P. Moore, U. S. C. J.

New York, N. Y., November 26, 1962.

[fol. 316]

IN THE UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK

Civ. 62-2601

YVETTE M. WRIGHT, et al.,

—against—

NELSON A. ROCKEFELLER, et al.

MURPHY, D.J. (dissenting):

The majority opinions both find that plaintiffs have failed in their proof, i.e., they have not proved a *prima facie* case of unconstitutional deprivation of their rights.

I disagree and find that plaintiffs have borne their *prima facie* burden (*Hernandez v. Texas*, 347 U.S. 475) and because of the absence of any proof by defendants or intervenors they are entitled to judgment declaring the challenged portion of Chapter 980 unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. Let me premise my reasons with a few concessions.

I concede that there was a total absence of direct proof of any specific intent by the New York Legislature in drawing the lines of any district; I concede that disparity alone in the population of one district compared to another or to a general state or city average is not dispositive; I concede that of itself a district's lines whether jigsaw, straight, serpentine or otherwise would not be controlling; I concede that some disproportion of numbers of ethnic groups in adjoining districts would not be enough; I concede that [fol. 317] the federal courts should ordinarily refrain from entering into "political thickets" and that it is beyond our competence to suggest or supervise a remedy for unlawful apportionment. But see *Inequities in Districting for Congress: Baker v. Carr* and *Colegrove v. Green*, 72 Yale L.J. 13 (1962).

The uncontradicted proof submitted by plaintiffs, however, establishes a visual figure picture of the end results

of the recent redistricting of Manhattan Isle (New York County) as follows:

Manhattan has a population of 1,698,281 people and is entitled to four congressmen. The census figures of 1960 divided the ethnic groups into only two classes—white and non-white and Puerto Rican. These classes have been counted and according to the census 1,058,589 or 62.3% are white and 639,622 or 37.7% are non-white and Puerto Rican.

The district lines as fixed by Chapter 980 created the four districts in question with the following make-up:

| District | Total Population | White Population | % of District | Non-White and Puerto Rican Origin Population of District | |
|----------|---------------------|---------------------|---------------|--|-------|
| 17th | 382,320 | 362,668 | 94.9% | 19,652 | 5.1% |
| 18th | 431,330 | 59,216 | 13.7% | 372,114 | 86.3% |
| 19th | 445,175 | 318,223 | 71.5% | 126,952 | 28.5% |
| 20th | 439,456 | 318,482 | 72.5% | 120,974 | 27.5% |
| Total | 1,698,281 | 1,058,589 | 62.3% | 639,692 | 37.7% |

The following table shows the percent of non-white persons and persons of Puerto Rican origin in each congressional district in relation to the total number of such persons in the entire county:

[fol. 348]

| District | % of Non-White and Puerto Rican of County |
|----------|--|
| 17th | 3.1% |
| 18th | 58.2% |
| 19th | 19.8% |
| 20th | 18.9% |
| | 100.0% |

The figure picture of the 17th District shows that the lines as drawn encompass a population 94.9% white and 5.1% non-white and Puerto Rican. It further shows it has a population of 382,320 people, or between 15.4%

and 12% less than any of the adjoining districts. The 18th District encompasses a population that is 86.3% non-white and Puerto Rican and only 13.7% white. Its population of 431,330 people is 12% more than the 17th and 5% above the state average.

It is my judgment that the only available inference from the above uncontradicted figure picture establishes *per se* a *prima facie* case of a legislative intent to draw Congressional district lines in the 17th and 18th Districts on the basis of race and national origin. To me it fits foursquare with Mr. Justice Frankfurter's statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 341, that the act in question was not an ordinary geographical redistricting measure even within the familiar abuses of gerrymandering. Although Justice Frankfurter's statement referred to the court's holding that there was a violation of the fifteenth amendment this statement is equally apposite to the equal protection clause of the fourteenth amendment under *Brown v. Board of Education*, 347 U.S. 483. Cf. the concurring [fol. 319] opinion of Mr. Justice Whittaker in *Gomillion* at 349. The conclusion here is, as in *Gomillion*, irresistible, tantamount for all practical purposes, to a mathematical demonstration that the legislation was solely concerned with segregating white, and colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th).

We assume that had the district lines of the 17th District been drawn so as to exclude all non-white and Puerto Ricans, or the 18th to exclude all white, my brothers would agree that plaintiffs had established a *prima facie* case of *per se* segregation. *Gomillion v. Lightfoot*, *supra*. It is acknowledged, however, that plaintiffs' uncontradicted evidence demonstrates that New York County, an island having 639,692 non-white and Puerto Ricans or 37.7% of the total population, was redistricted into four congressional districts with one district, the 17th, having only 5.1% non-whites and Puerto Ricans and the 18th with only 13.7% white.

The question then posed is— Does the fact that the congressional district lines decreed by the state legislature for the 17th District to encompass only 5.1% non-white and

Puerto Rican and the 18th only 13.7% white as distinguished from 0% so dilute plaintiffs' proof as to require them to prove more? If so, did they do it when the uncontradicted proof also showed that the 17th District had 15.4% less people than the adjoining 19th District; 14% less than the 20th and 12% less than the 18th. My brothers say "No" and I disagree.

It might very well be that the defendants and intervenors [fol. 320] could have offered proof to counteract the inference of racial segregation that plaintiffs' proof implies but they did not—and furthermore they chose not to do so. They might have proved all of the factors enumerated by Mr. Justice Frankfurter in *Baker v. Carr*, 369 U.S. 186 at 323, that go into the complicated political potpourri of apportionment. They might have proved that the lines were drawn as part of a political compromise between the major political parties to insulate certain sections for "traditional purposes"—but the simple answer is that they did not.

What more need plaintiffs prove? Surely it cannot be argued that they must prove some oral or written statement made by the legislature either in the form of a committee report or from the manager of the bill, or statements from the legislators themselves. It is undisputed that no public hearings were had on the bill and that the only report filed was the interim report of the Joint Legislative Committee on Reapportionment referred to by Judge Moore. The bill recommended was submitted to the legislature on November 9, 1961, and passed on November 10, 1961, and was signed by the Governor that day. N.Y. Sess. Laws, 2d Extraordinary Sess. 1961, c. 980, §§110-12.

Judge Feinberg and I part company only on the quantum of plaintiffs' proof. He agrees that the plaintiffs are not required to prove any diminution or dilution of their voting rights. They prove their *prima facie* case once they show that the district lines were constituted on racial basis but he agrees with Judge Moore that the plaintiffs have not proved enough—but neither opinion tells us how much more or enough of what.

[fol. 321] Judge Feinberg states that the principal area of the inquiry must be the changes brought about by the

1961 redistricting. With this as his premise he points out that the 17th District has approximately only 7% less population than the average for the state and such disproportion does not justify a finding of racial discrimination. I agree.

All I say is, it is a factor or a fact to be considered with all of the others, keeping in mind that the legislature was dividing an island into four districts and such island contained 37.7% non-white and Puerto Ricans.

He also suggests that the word picture of figures would infer not discrimination along racial lines but rather that non-white and Puerto Ricans live in certain concentrated areas so that district lines encompassing these areas would necessarily include a very high percentage of non-white and Puerto Ricans. This is exactly my point and also the plaintiffs. The pattern of the 18th District lines shows that they were drawn so that any district lines encompassing these areas would necessarily include a very high percentage of non-whites and Puerto Ricans. And, we might add, a very high percentage of whites in the 17th.

In answer to my question— What more need plaintiffs prove? He says some answers might be—not should be, but might be: (a) *Failure to build on prior lines in a rational, logical manner.* This presumes that the prior lines were without any constitutional infirmity. In any event, how does one build four districts on foundations of six [fol. 322] districts? (b) *A greater population disparity.* It is suggested that if the plaintiffs had shown a failure to increase the population in the 17th District enough to keep it without a fair approximation of the state average a stronger inference might be drawn that the population was deliberately kept small because adding to it could only increase the non-white and Puerto Rican percentage. The 17th District is 7% below the state average. Would 8% be enough, or 9%, or 10%, etc.? What is a fair approximation? Isn't it really a question of fact? How do you weigh such questions when a defendant offers no proof? I submit that the scale tips toward the plaintiffs. The City of New York with 7,781,984 people has been divided by the legislature into 19 districts with an average population per district of 409,578. It is true that the New York City aver-

age population almost equals the average population per district throughout the state. But why must we make comparisons with the entire 19 districts in the City of New York or the entire 41 districts in the state? We are dealing with Manhattan Island which for all practical purposes is a unique metropolitan area with many well-known river to river cross streets and famous north and south or longitudinal streets. See, for example, the plaintiffs other proof in which they demonstrated by three hypothetical divisions how the island could have been divided into four districts on a logical and rational basis using the natural boundaries or well-known streets and avenues. I agree that such hypothetical districts are not conclusive but they do have some probative value and I think are helpful in pointing up the obvious segregation that the legislature effected. (c) *An increase in boundary zigzagging.* How much of an increase [fol. 323] and how is the number of zigzags measured or counted, and do you compare the zigzagging lines with the lines drawn by the legislature in 1951 or 1941, and do you confine yourself to Manhattan Island or New York City or any district in any part of the state.

I agree that no plaintiff, or for that matter any person on Manhattan Island, has lost or been deprived of a right to vote for Congress or that his vote will not be counted but the parallel to *Gomillion* (concurring opinion) is clear. There it was a glaring exclusion of Negroes from a municipal district. Here it is a subtle exclusion from a "silk stocking district" (as the 17th is so frequently referred to) and a jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors.

We are told that the fifteenth amendment nullifies sophisticated as well as simple-minded discrimination. In my judgment the New York legislature has attempted, in violation of the equal protection clause of the fourteenth amendment, a sophisticated and subtle discrimination. Accordingly, I would give judgment for plaintiffs that the challenged part of the act is unconstitutional.

Thomas F. Murphy, U. S. D. J.

[fol. 324] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil 62-2601

YVETTE M. WRIGHT, et al., individually and on behalf of all
others similarly situated, Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the State of
New York, et al., Defendants.

FEINBERG, D.J. (concurring in result):

I concur in the result reached by Judge Moore because I feel that plaintiffs have not met their burden of proving that the boundaries of the new 17th, 18th, 19th, and 20th Congressional Districts were drawn along racial lines, as they allege. I differ from the opinion of Judge Moore, however, in two major respects.

[fol. 325] 1. Judge Moore's opinion in several places implies that it is necessary for plaintiffs to show not only that the boundaries of the congressional districts were drawn on racial lines but also that there was some other dilution or diminution of the plaintiffs' right to vote. I disagree with this implication. If plaintiffs had proved that the district lines were constituted on a racial basis, the fact that plaintiffs had an undiminished right to vote in such gerrymandered districts would be irrelevant. The constitutional vice would be use by the legislature of an impermissible standard, and the harm to plaintiffs that need be shown is only that such a standard was used. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Baker v. Carr*, 369 U.S. 186 (1962), provide support for the view that racially gerrymandered districts violate the Fifteenth Amendment, which provides that: "The right of citizens of the United States to vote shall not be denied or abridged

... on account of race, color, or previous condition of [fol. 326] servitude." In *Baker*, Mr. Justice Douglas referred to the *Gomillion* case as an instance "where a federal court enjoins gerrymandering based on racial lines,"¹ and further stated that:

"Race, color, or previous condition of servitude is an impermissible standard by reason of the Fifteenth Amendment, and that alone is sufficient to explain *Gomillion v. Lightfoot*, 364 U.S. 339."²

It is true that the emphasis in the *Gomillion* opinion is on the deprivation of a pre-existing right to a municipal vote. However, analysis of that case indicates that the Negroes of Tuskegee were free to establish their own separate municipality merely by filing a petition signed by 25 persons.³ The view that racially drawn districts *per se* would also violate the Equal Protection Clause of the Fourteenth Amendment finds support in the *per curiam* decisions of the Supreme Court following *Brown v. Board of Educ.*, 347 U.S. 483 (1954). These cases⁴ outlawed racial segregation in public parks, beaches, buses, and golf courses without

¹ 369 U.S. at 250 n. 5.

² *Id.* at 244. But see the concurring opinion of Mr. Justice Whitaker in *Gomillion* where he stated that there was no violation of the Fifteenth Amendment by racial redistricting as long as the complaining voter enjoys the same right to vote as all others in the same district. *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960). Under those circumstances, however, Mr. Justice Whitaker thought there would be a violation of the Equal Protection Clause of the Fourteenth Amendment. *Ibid.*

³ See Lucas, *Dragon In The Thicket: A Perusal of Gomillion v. Lightfoot*, Supreme Court Review 194, 210-11 (1961), where the author also suggests additional reasons for viewing the case as barring any segregation of voters even absent a technical loss of voting rights.

⁴ *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958); *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Mayor v. Dawson*, 350 U.S. 877 (1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954). See *Fay v. New York*, 332 U.S. 261, 292-93 (1947). See also *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

any discussion of harm resulting from discrimination in [fol. 327] the use of those facilities. The issue can be posed by assuming a state statute which on its face indicated that all Negro voters would vote in one district and all white voters in another, with the number of persons in each district approximately equal. I have little doubt that such a statute would be held unconstitutional, but whether under the Fourteenth or Fifteenth Amendment, or both,⁵ need not be decided now, in view of plaintiffs' failure to prove their case.

* The intervenors contend that redistricting along the lines suggested by plaintiffs would, in effect, jeopardize the "control" by non-whites and Puerto Ricans of at least one congressional district. This—the loss of an alleged advantage to the class of voters plaintiffs claim to represent—is as irrelevant to the constitutional issue as the need to show some harm other than that inherent in the drawing of district lines on a racial basis. The argument assumes that under the Constitution there can be "good" segregation along racial lines as against "bad" segregation.⁶ With respect to redistricting, the answer to this is found in Mr. [fol. 328] Justice Harlan's famous phrase that the Constitution is color-blind.⁷

2. The case is a closer one for me than the opinion of Judge Moore would indicate it is for him. Plaintiffs did

⁵ Plaintiffs here rely on both Amendments.

⁶ See *Hughes v. Superior Court*, 339 U.S. 460 (1950) (picketing to compel the hiring of employees in proportion to the racial origin of employer's customers enjoined); cf. *Progress Dev. Corp. v. Mitchell*, 182 F.Supp. 681 (N.D. Ill. 1960); *rev'd in part*, 286 F.2d 222 (7 Cir. 1961) (real estate developer's imposition of a "benevolent" quota); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 Yale L.J. 1387 (1962), and authorities collected therein.

⁷ In his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896), Mr. Justice Harlan stated: "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as a man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

introduce evidence which might justify an inference that racial considerations motivated the 1961 reapportionment of congressional districts in Manhattan. However, other inferences, as set forth below, are equally or more justifiable. Plaintiffs have a difficult burden to meet in attacking the constitutionality of this state statute. See *Baker v. Carr*, *supra* at 266 (Stewart, J., concurring); *W.M.C.A., Inc. v. Simon*, 208 F.Supp. 368, 373 (S.D.N.Y. 1962). Upon analysis, I do not think that burden has been met.

In the 1961 redistricting, the legislature had to compress six New York County districts into four. This was done in what appears to be a logical fashion. Thus, in the 17th Congressional District, upon which plaintiffs have particularly focused, the legislature started with the outlines of the District as it was before and moved the lines in a rational manner. The area was expanded considerably on the east to the East River and to the north in even and contiguous fashion. This resulted in straighter and apparently more logical congressional lines than before, and most of the prior jigsaw appearance of the District lines on the eastern boundary was eliminated.* Thus, examination of the actual changes effected by the 1961 redistricting does not support plaintiffs' contention of racial discrimination. It is proper, of course, to focus primarily on these changes rather than the changes on the western boundaries of the 17th District legislated in 1941 and 1951. As to the 1941 changes, plaintiffs themselves concede in their post-trial memorandum that "a pattern of discriminatory fencing out of the 17th District really began to emerge only with the 1951 redistricting."† In any event, as to the western side of the 17th District generally (which the 1961 redistricting did not change), the record indicates that if the zig-zags were now eliminated, the number of non-whites and Puerto Ricans brought into the District by this correction of [fol. 330] the boundary lines would approximately equal the number of non-whites and Puerto Ricans excluded by the

* The 17th District apparently had 49 lines prior to the 1961 redistricting and 31 subsequent to it.

† Post-trial Brief for plaintiffs, p. 19.

change.¹⁰ I am not asserting that prior lines, once drawn, could not become discriminatory because the legislature, for racial reasons, deliberately failed to act over the years. However, in this case the proof adduced falls far short of establishing that contention. Therefore, the principal area of inquiry must be the changes brought about by the 1961 redistricting, and as to these, the district lines seem more rational than before.

One of plaintiffs' principal contentions is that if the 17th District were to be expanded in any direction so as to be made reasonably equal in population to the other congressional districts in New York County, any area to be added would substantially increase the percentage of non-whites and Puerto Ricans in the 17th District. Plaintiffs argue, therefore, that the 17th District's population was deliberately kept unreasonably low to avoid this result. However, although the population of the 17th District is appreciably [fol. 331] smaller than its neighboring districts, it is still only about 27,000 below the average for the state, or less than 7 per cent, as Judge Moore points out. It is true that increasing the population of the 17th District to the average by moving the district lines up or down in contiguous fashion would probably result in a higher percentage of non-whites and Puerto Ricans in that District. However, a variation of only 7 per cent from the average does not, in my mind, justify a finding of racial discrimination.

The dissenting opinion notes that defendants and the intervenors might have proved that the district lines in question were drawn "as part of a political compromise between the major political parties" but that no proof of this was submitted. Although the intervenors raised as a defense the contention that the boundaries of the 17th District were formed "along partisan political lines rather than racial lines," there is no evidence in the record bearing on this issue.¹¹ Therefore, as I see it, none of the opin-

¹⁰ Record, p. 134.

¹¹ After the close of hearings, the Court requested the parties, by stipulation, to furnish additional information as to population, voting and enrollment figures for certain designated areas. However, plaintiffs objected to the relevance of this information and to

ions in this case deal with the question of whether the [fol. 332] drawing of district lines on a political basis would be constitutionally permissible.¹²

Apart from political considerations, then, the dissenting opinion concludes that "the only available inference" from the figures on percentages of non-whites and Puerto Ricans relied upon by plaintiffs is one of legislative intent to draw district lines on the basis of race and national origin. I do not agree that this is the only available inference. On the record in this case, the figures give rise to another inference equally, or more, persuasive. That inference is that since the non-whites and Puerto Ricans in Manhattan live in certain concentrated areas (see plaintiffs' Exhibit 4), many combinations of possible congressional district lines, no matter how innocently or rationally drawn, would also result in comparable figures. This is made clear, for example, by one of plaintiffs three suggested alternative methods of drawing congressional district lines in Manhattan. Under plaintiffs' proposed Plan B, the percentage of non-whites and Puerto Ricans in one district would be [fol. 333] 9.5 per cent, while in another district it would be 59.1 per cent. Even though these percentages differ greatly, would racial discrimination be "the only available inference" from these figures? Clearly, since plaintiffs have suggested the plan, such an inference would not be available at all, much less be the only available inference.

The dissent also properly asks, "What more need plaintiffs prove?" Some answers might be: a failure to build upon prior lines in a rational, logical manner, a greater population disparity, and an increase in boundary zigzagging. If plaintiffs had shown, for example, a failure to increase the population in the 17th District enough to keep it within a fair approximation of the statewide average, a stronger inference might be drawn that the population

the procedure by which it was being obtained. Therefore, the Court is not considering as part of the record before it the information which was furnished by defendants.

¹² In a supplemental brief, plaintiffs contend that it would not be. See Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39, 43 (1962).

was deliberately kept small because adding to it could only increase the non-white percentage. In addition, if the increase had been achieved by aggravating the jigsaw nature of the boundaries or by drawing them in a serpentine manner,¹³ a different case might be presented. It is true that [fol. 334] there was some jigsawing at the top and the bottom of the new 17th District, but this was very slight. For example, Stuyvesant Town, which has a very small non-white and Puerto Rican population, was added to the District at the bottom, but the immediately adjacent area to the west, with an appreciably higher percentage of non-whites and Puerto Ricans, was not. The addition of Stuyvesant Town to the District, however, does not give rise only to the inference of racial discrimination. It also gives rise to the inference, equally persuasive, that the social and economic background of the residents of Stuyvesant Town made a unit which logically had a community of interest with the residents of the 17th District.¹⁴ In short, based upon the entire record, I do not feel that plaintiffs have proved their case.

Dated: New York, N. Y., November 26, 1962.

Wilfred Feinberg, U. S. D. J.

¹³ Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

¹⁴ See *Baker v. Carr*, 369 U.S. 186, 323 (1962) where Mr. Justice Frankfurter stated:

"Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others."

While it is true that this language came from the dissenting opinion, it does not appear that the majority of the Court would disagree with this analysis of the apportionment process.

[fol. 338]

[The endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
62 Civil 2601

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO,
BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all
individually and on behalf of all other persons similarly
situated, Plaintiffs,

—VS.—

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, and DENIS J. MAHON, JAMES M.
POWER, JOHN R. CREWS and THOMAS MALLEE, Commis-
sioners of Elections constituting the Board of Elections
of the City of New York, Defendants,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and AN-
TONION MENDEZ, Defendants-Intervenors.

JUDGMENT—November 26, 1962

The above-entitled action having come on regularly for
trial before the Honorable Leonard P. Moore, Circuit
Judge and the Honorable Thomas F. Murphy and Wilfred
Feinberg, District Judges, on August 9, 15 and 28, 1962,
without a jury (all parties being represented by counsel);
and on November 26, 1962, in an opinion by Circuit Judge
Moore (Judge Murphy dissenting and Judge Feinberg
concurring); the court having found the complaint must
be dismissed with no costs; it is

Adjudged: The defendants shall have judgment against
the plaintiffs dismissing the complaint without costs.

Dated: New York, N. Y., November 26, 1962.

Herbert A. Charlson, Clerk.

[fol. 339]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed January 23, 1963

I. Notice is hereby given that Yvette M. Wright, Horacio L. Quinones, Darwin Bolden, Benny Cartagena, Ramon Diaz, Joseph R. Erazo, Blórneva Selby, Walsh McDermott, Seth Dubin, all individually and on behalf of all other persons similarly situated, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on November 26, 1961.

This appeal is taken pursuant to 28 U.S.C. § 1253.

[fol. 340] II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of the proceedings, including all original exhibits received in evidence.

III. The following questions are presented by this appeal:

1. Whether that portion of Chapter 980 of the 1961 laws of the State of New York which delineates the boundaries of the Congressional districts in New York County segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment.

2. Whether a statute which segregates persons by race or place of origin may be declared constitutional on the ground that no proof of specific harm to the individuals subject to the statute has been adduced at trial.

3. Whether a statute which has the effect of segregating persons by race or place of origin may be constitutionally justified on the ground that the legislative purpose was to classify persons according to social and economic background or other factors.

4. Assuming, *arguendo*, that an alternative legislative purpose may sustain a statute which has the effect of segregating persons by race or place of origin, (a) whether plaintiffs attacking the constitutionality of the statute must affirmatively rebut every possible alternative legislative purpose in the absence of any allegation and proof of such purpose by the defendants; and (b) whether a court may sustain the constitutionality of the statute on the grounds of an alternative legislative purpose regarding which no proof has been adduced at trial and which is not the proper subject of judicial notice.

Justin N. Feldman, 415 Madison Avenue, New York
17, New York;

Jerome T. Orans, 10 East 40th Street, New York 16,
New York,

Attorneys for Plaintiffs.

[fol. 341] Proof of Service (omitted in printing).

[fol. 342] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER FOR TRANSMITTAL OF ORIGINAL RECORDS
TO SUPREME COURT—March 14, 1963

Upon the annexed affidavit of Jerome T. Orans, duly sworn to the 13th day of March, 1963, upon the Notice of Appeal of plaintiffs-appellants Yvette M. Wright, Horacio L. Quinones, Darwin Bolden, Benny Cartagena, Ramon Diaz, Joseph R. Erazo, Blorneva Selby, Walsh McDermott

and Seth Dubin filed herein on the 23rd day of January, 1963, and upon all the papers filed and proceedings had herein,

[fol. 343] Now, upon motion of Justin N. Feldman and Jerome T. Orans, attorneys for the above-named plaintiffs-appellants, it is hereby

Ordered that, pursuant to Rule 12(4) of the Supreme Court of the United States, the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Supreme Court of the United States all the original papers filed in the Office of the Clerk of this Court and specified in the designation of the above-named plaintiffs-appellants contained in their Notice of Appeal; and it is further

Ordered that said records be returned to the Clerk of this Court upon the conclusion of this appeal.

Dated: March 14th, 1963.

Edward C. McLean, U.S.D.J.

[fol. 344]

ATTACHMENT TO ORDER

State of New York,
County of New York, ss.:

Jerome T. Orans, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs-appellants Yvette M. Wright, Horacio L. Quinones, Darwin Bolden, Benny Cartagena, Ramon Diaz, Joseph R. Erazo, Blorneva Selby, Walsh McDermott and Seth Dubin, and am familiar with the proceedings herein. I submit this affidavit in support of the annexed proposed order for the transmission of original papers herein to the Clerk of the Supreme Court of the United States for filing in connection with the appeal noticed herein on January 23, 1963.

2. The above-entitled action was brought to have declared unconstitutional and enjoined from operation that

portion of Chapter 980 of the laws of the State of New York which delineates the boundaries of the Congressional districts in New York County. It was heard by a statutory three-judge court of this District, which court on November 26, 1962 filed its opinion and order of judgment dismissing the complaint.

3. Notice of Appeal from said judgment to the Supreme Court of the United States was duly filed herein on January 23, 1963 by plaintiffs-appellants and said notice designates the portion of the record herein desired to be transmitted to the Clerk of the Supreme Court of the United States as the record on appeal. No cross-designation of additional portions of the record has been filed on behalf of the defendants or the defendants-intervenors.

4. The annexed order provides for transmittal of the original papers constituting the record on appeal to the Clerk of the Supreme Court of the United States for filing. This application for said order is made in accordance with the provisions of Rule 12(4) of the Rules of the Supreme Court, which authorizes the transmittal of the original record when such transmittal is necessary and proper. The purpose of this order is to facilitate filing the record on appeal without unnecessary retyping, comparing and other mechanics of making a separate transcript. The record [fol. 346] includes not only the basic moving papers, but also the transcript of the argument and several exhibits, and accordingly is moderately lengthy.

5. I will provide full cooperation and assistance to the office of the Clerk of this Court in assembling the designated papers.

6. No previous application for the relief herein requested has been made.

Jerome T. Orans

Sworn to before me this 13th day of March, 1963.

Stephen A. Wareck, Notary Public, State of New York,
No. 31-4156815, Qualified in New York County, Commission
Expires March 30, 1963.

[fol. 347]

[File endorsement omitted].

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
62 Civ. 2601

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLOR-
NEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all indi-
vidually and on behalf of all other persons similarly
situated, Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS LEFKOWITZ, Attorney General of the State
of New York, CAROLINE K. SIMON, Secretary of State of
the State of New York, and DENIS J. MAHON, JAMES M.
POWER, JOHN R. CREWS and THOMAS MALLEE, Commis-
sioners of Elections constituting the Board of Elections
of the City of New York, Defendants,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO
MENDEZ, Defendants-Intervenors.

STIPULATION RE EXHIBITS TO BE FILED WITH THE SUPREME
COURT AS PART OF RECORD ON APPEAL—Filed March 21, 1963

It is hereby stipulated by and among the parties to this
case, by their attorneys of record, that the exhibits below
listed were all of the exhibits received in evidence on the
trial of this case, and thus constitute the exhibits desig-
nated by the Plaintiffs-Appellants in their Notice of Ap-
peal filed herein on January 23, 1963 as a portion of the
[fol. 348] record on appeal to be transmitted to the Clerk
of the Supreme Court of the United States in connection
with the appeal from the District Court judgment in this
case;

Plaintiffs' Exhibits

1. Eight affidavits—one by each of the following plaintiffs: Yvette M. Wright, Horacio L. Quinones, Darwin Bolden, Benny Cartagena, Joseph R. Erazo, Blorneva Selby, Walsh McDermott and Seth Dubin.

2-A. New York City Board of Elections map of New York County Congressional Districts immediately before current (challenged) reapportionment.

2-B. New York City Board of Elections map of New York County Congressional Districts as set up by current (challenged) reapportionment.

2-C. Composite New York City Board of Elections map showing lines of New York County Congressional Districts before current reapportionment and lines set up by current (challenged) reapportionment.

3. Tables showing number of non-White persons and persons of Puerto Rican origin who reside in each of the four Congressional Districts of New York County.

4. Map of part of New York County showing, by census tracts, the relative percentage of non-Whites and Puerto Ricans in the population.

4-A. Overlay for plaintiffs' exhibit 4 with red taped lines showing boundaries of current (challenged) 17th Congressional District.

4-B. Overlay for plaintiffs' exhibit 4 with taped line showing boundaries of 17th Congressional District immediately before current (challenged) reapportionment.

5. Report from the Census Bureau under seal of United States Department of Census, signed by Director of Bureau of the Census showing count in enumeration districts involved in cut census tracts.

6. Three map charts showing hypothetically equitable districts based on the premise that each Congressional District should have a population as close as possible to one-fourth of New York County's population.

7. Letter from New York City Housing Authority re Gerard Swope Housing Projects with number of tenants and percentage of White, Negro, Puerto Rican, Chinese and other.

[fol. 349]

Defendants' Exhibits

A. Certification of certain statistics by Bureau of the Census pertaining to the 17th Congressional District.

B. Statement from President of the United States relating to the 18th decennial census of the population, House Doc. No. 46.

C. Map of New York County Congressional Districts set up by reapportionment of 1911.

D. Map of New York County Congressional Districts set up by reapportionment of 1917.

E. Map of New York County Congressional Districts set up by reapportionment of 1922.

F. Map of New York County Congressional Districts set up by reapportionment of 1941.

G. Map of New York County Congressional Districts set up by reapportionment of 1951.

H. Map of New York County Congressional Districts set up by reapportionment of 1961.

This stipulation is being executed because Rule 19 of the General Rules of the United States District Court for the Southern District of New York provides that, except in cases tried by masters or commissioners, exhibits are not to be filed with the Clerk of the Court, and is being executed for no other purpose.

This stipulation may be executed in a counterpart for each attorney of record.

*Justin N. Feldman, Attorney of Record for Yvette M. Wright, Horacio L. Quinones, Darwin Bolden, Benny Cartagena, Ramon Diaz, Joseph R. Erazo, Blorneva Selby, Walsh McDermott and Seth Dubin, plaintiffs-appellants.

[fol. 350] *Irving Galt, Solicitor General of the State of New York, Attorney of Record for Nelson A. Rockefeller, Louis Lefkowitz and Caroline K. Simon, Defendants-Appellees.

*Leo A. Larkin, Corporation Counsel of the City of New York, Attorney of Record for Denis J. Mahon, James M. Power, John R. Crews and Thomas Mallee, Defendants-Appellees.

*Robert W. Seavey, *Morris Sterenbuch, *Jawn A. Sandifer, *William C. Chance, Attorneys of record for Adam Clayton Powell, J. Raymond Jones, Lloyd E. Dickens, Hulan E. Jack, Mark Southall and Antonio Mendez, Defendants-Intervenors-Appellees.

Dated: March 21, 1963.

* Clerk's note: Duplicate copies of stipulation were signed by each attorney of record.

[fol. 351]

PLAINTIFFS' EXHIBIT 1
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

YVETTE M. WRIGHT, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled action;

(2) That I reside at 302 West 107th Street, in the County and State of New York;

(3) That I am a citizen of the United States and a registered voter of the 20th Congressional District in the State of New York and have resided at my present address since April 1957.

/s/ YVETTE M. WRIGHT

Sworn to before me this
7th day of August, 1962.

/s/ PAUL R. FRANK

PAUL R. FRANK

Notary Public, State of New York

No. 41-1299808 Queens County

Certificate Filed in New York County

Term Expires March 30, 1963

[SEAL]

[fol. 352]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

BENNY CARTAGENA, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled action;

(2) That I reside at 515 East 12th Street, in the County and State of New York;

(3) That I am a citizen of the United States and a registered voter of the 19th Congressional District in the State of New York and have resided at my present address since April 1952.

/s/ BENITA CARTAGENA

Sworn to before me this
7th day of August, 1962.

/s/ PAUL R. FRANK

PAUL R. FRANK
Notary Public, State of New York
No. 41-1299808 Queens County
Certificate Filed in New York County
Term Expires March 30, 1963

[SEAL]

[fol. 353]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

SETH DUBIN, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled action;

(2) That I reside at 196 East 75th Street, in the County and State of New York;

(3) That I am a citizen of the United States and a registered voter of the 17th Congressional District in the State of New York and have resided at my present address since January 1962.

/s/ SETH DUBIN

Sworn to before me this
7th day of August, 1962.

/s/ PAUL R. FRANK

PAUL R. FRANK
Notary Public, State of New York
No. 41-1299808 Queens County
Certificate Filed in New York County
Term Expires March 30, 1963

[SEAL]

[fol. 354]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

BLORNEVA SELBY, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled action;

(2) That I reside at 164 East 103rd Street, in the County and State of New York;

(3) That I am a citizen of the United States and a registered voter of the 18th Congressional District in the State of New York and have resided at my present address since Oct. 1953.

/s/ BLORNEVA SELBY

Sworn to before me this
7th day of August, 1962.

/s/ PAUL R. FRANK

PAUL R. FRANK
Notary Public, State of New York
No. 41-1299808 Queens County
Certificate Filed in New York County
Term Expires March 30, 1963

[SEAL]

[fol. 355]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOSEPH R. ERAZO, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled
action;

(2) That I reside at 152 East 116th Street, in the County
and State of New York;

(3) That I am a citizen of the United States and a regis-
tered voter of the 18th Congressional District in the State
of New York and have resided at my present address since
June 1962.

/s/ JOSEPH R. ERAZO

Sworn to before me this
7th day of August, 1962.

/s/ PAUL R. FRANK

PAUL R. FRANK
Notary Public, State of New York
No. 41-1299808 Queens County
Certificate Filed in New York County
Term Expires March 30, 1963

[SEAL]

[fol. 356]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

WALSH McDERMOTT, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled action;

(2) That I reside at 415 East 52nd Street, in the County and State of New York;

(3) That I am a citizen of the United States and a registered voter of the 17th Congressional District in the State of New York and have resided at my present address since October 1, 1961.

/s/ WALSH McDERMOTT

Sworn to before me this
8th day of August, 1962.

/s/ SARA V. MASTER

SARA V. MASTER

Notary Public, State of New York

No. 31-7756500

Qualified in New York County

Commission Expires March 30, 1964

[SEAL]

[fol. 357]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

HORACIO L. QUINONES, being duly sworn, deposes and
says:

(1) That I am one of the plaintiffs in the above entitled
action;

(2) That I reside at 561 West 172nd Street, in the County
and State of New York;

(3) That I am a citizen of the United States and a quali-
fied voter of the 20th Congressional District in the State
of New York and have resided at my present address since
1½ years.

/s/ HORACIO L. QUINONES

Sworn to before me this
8th day of August, 1962.

/s/ HENRY O. LEICHTER

HENRY O. LEICHTER
Notary Public, State of New York
No. 31-7481460
Qualified in New York County
Commission Expires March 30, 1964

[SEAL]

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 62-2601

YVETTE M. WRIGHT, et al., all individually and on behalf of
all other persons similarly situated,

Plaintiffs,

—against—

NELSON A. ROCKEFELLER, Governor of the
State of New York, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

DARWIN BOLDEN, being duly sworn, deposes and says:

(1) That I am one of the plaintiffs in the above entitled action;

(2) That I reside at 417 West 21st Street, in the County and State of New York;

(3) That I am a citizen of the United States and a registered voter of the 19th Congressional District in the State of New York and have resided at my present address since 1960.

/s/ DARWIN W. BOLDEN

Sworn to before me this
8th day of August, 1962.

/s/ HENRY O. LEICHTER

HENRY O. LEICHTER
Notary Public, State of New York
No. 31-7481460
Qualified in New York County
Commission Expires March 30, 1964

[SEAL]

IN UNITED STATES DISTRICT COURT

Southern District of New York

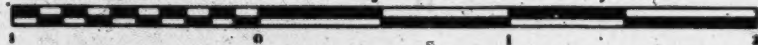
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DEPARTMENT OF CITY PLANNING

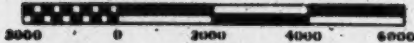
THE CITY OF NEW YORK

AUGUST 1936

SCALE IN MILES



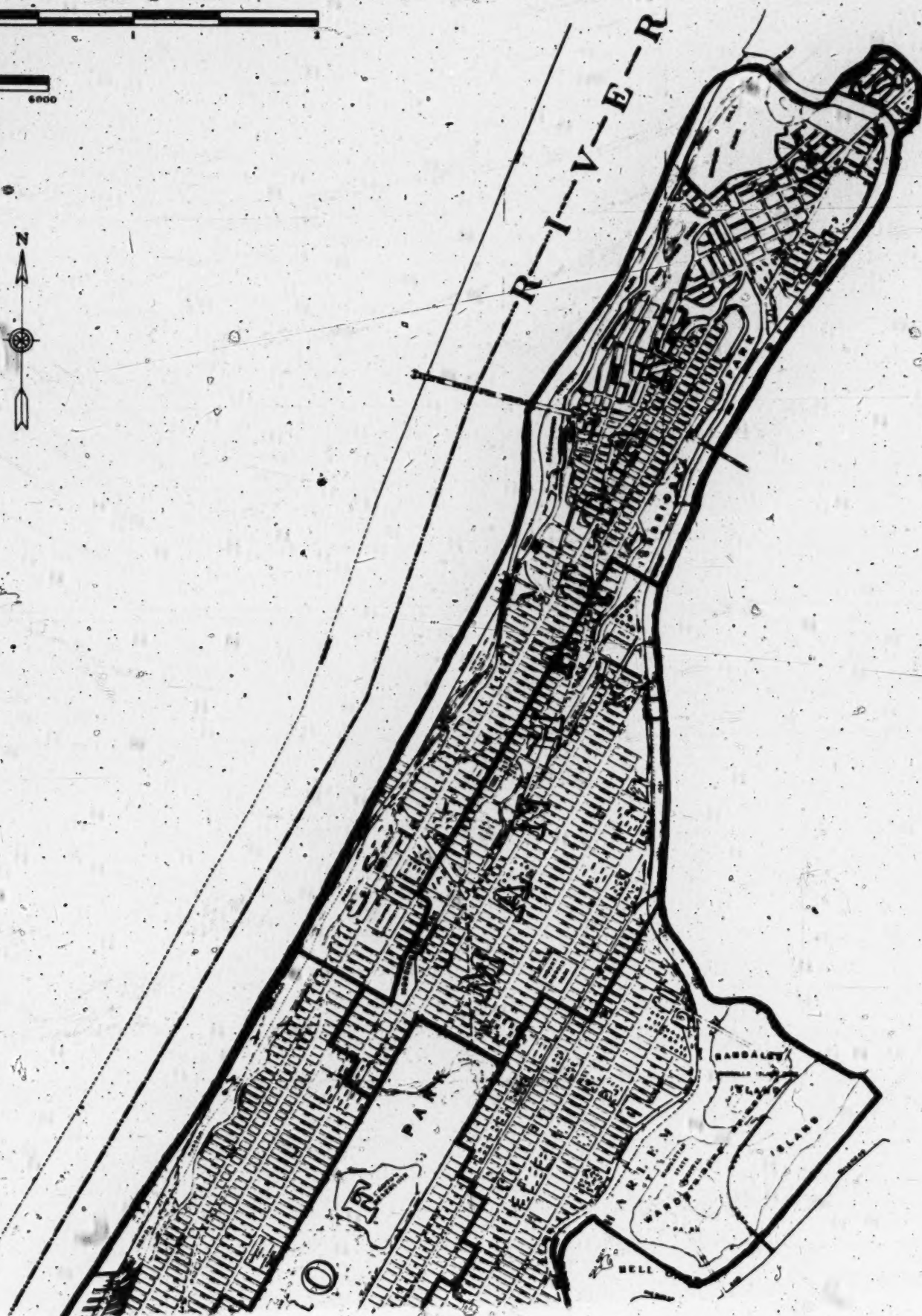
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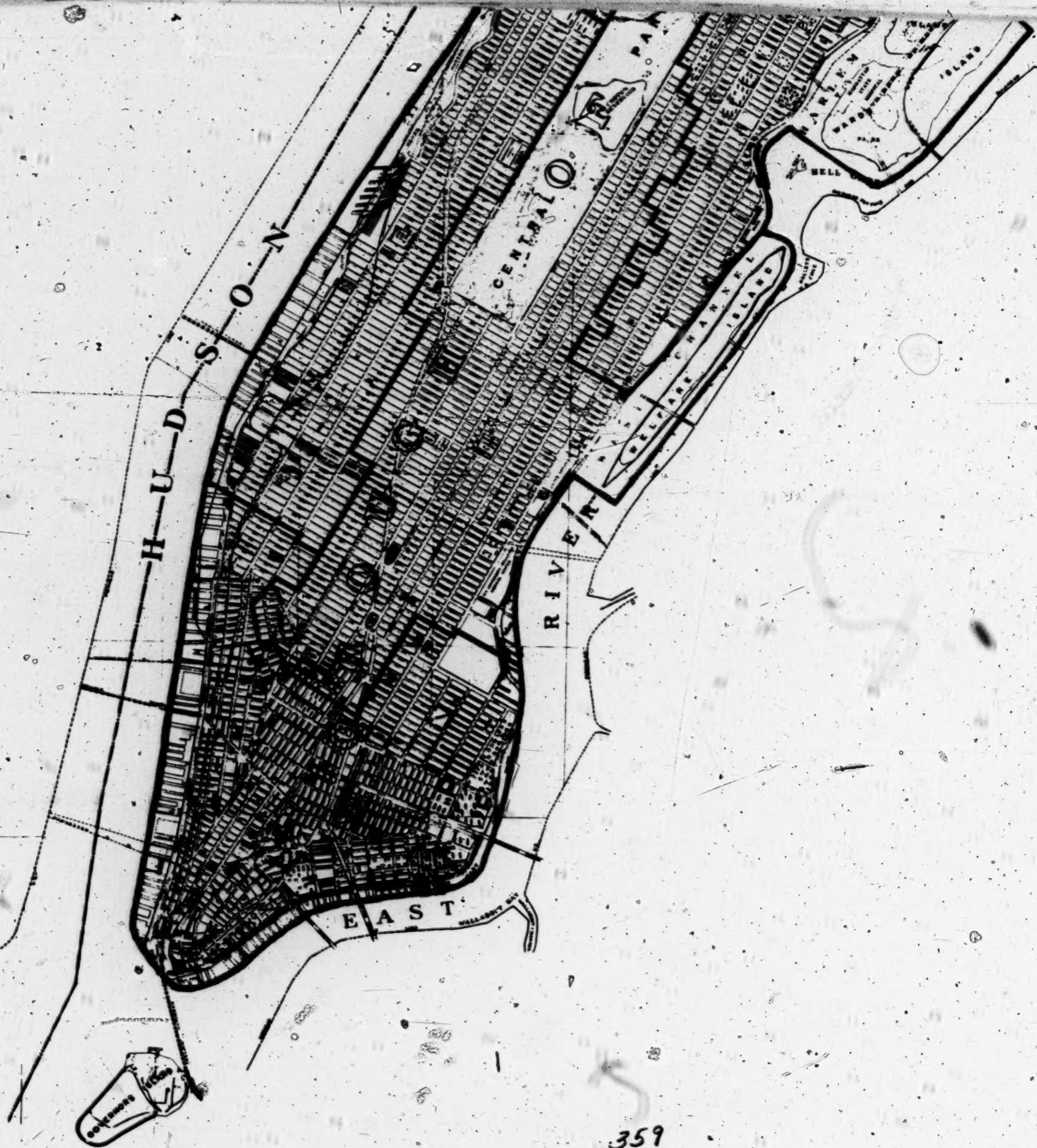


N



R-I-V-E-R





[fol. 359]


IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 2-A

[fol. 360]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

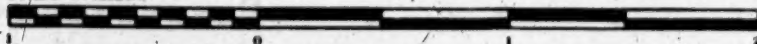
PLAINTIFFS' EXHIBIT 2-B

(See opposite) 

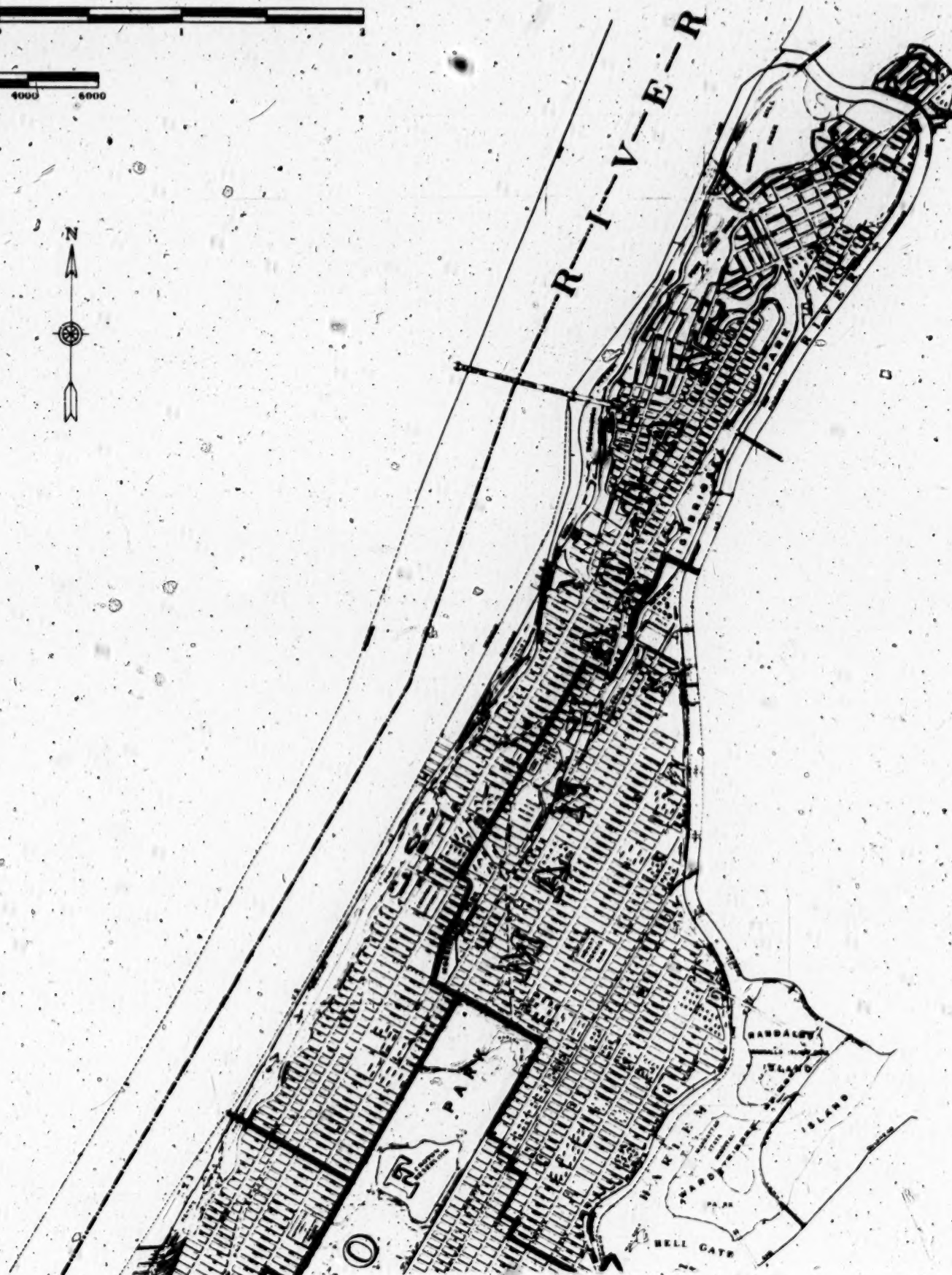
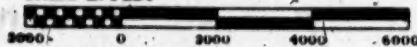
IN UNITED STATES DISTRICT COURT *Southern District of New York*
Plaintiffs' Exhibit 2-B

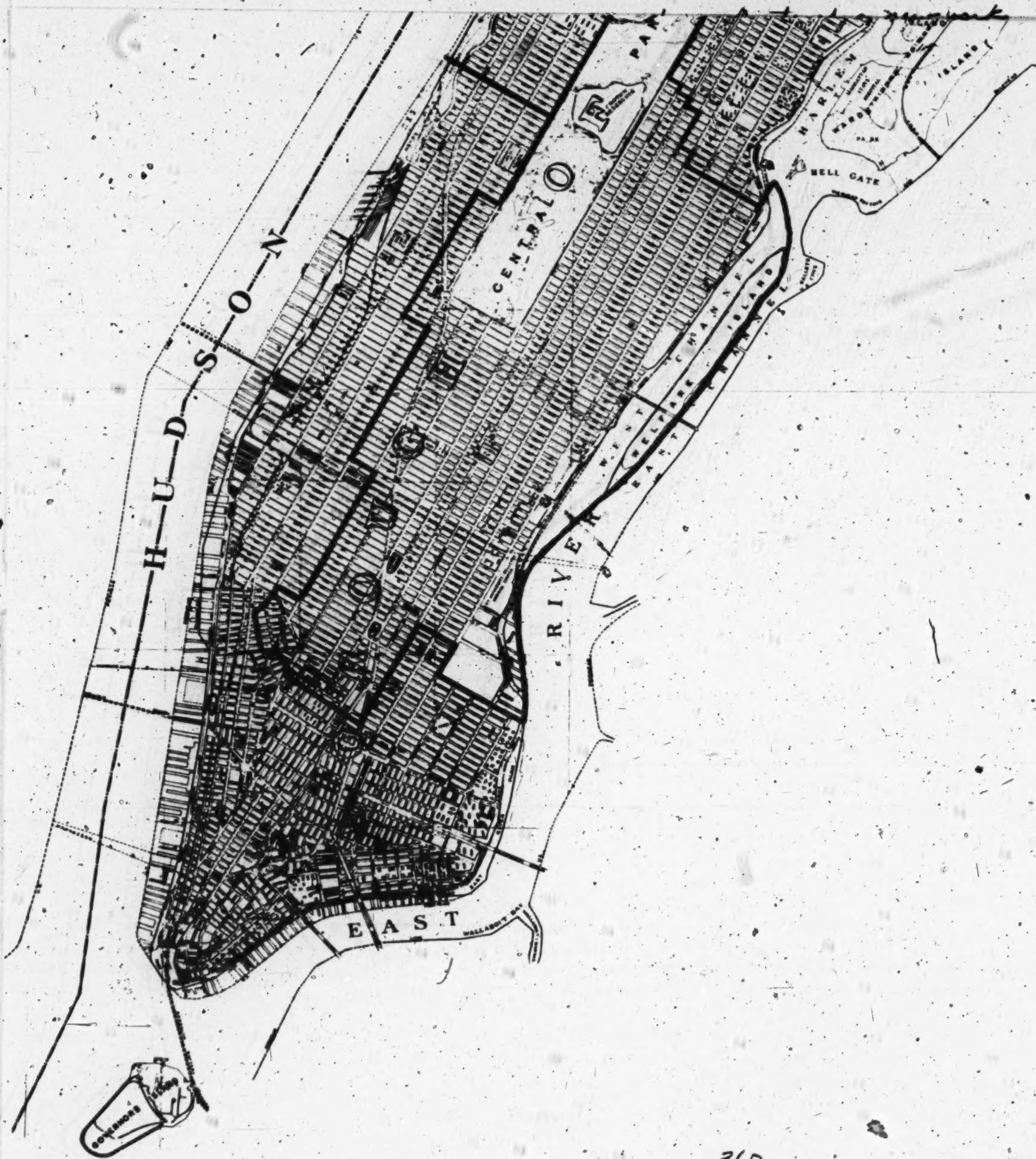
B **BOROUGH OF MANHATTAN**
DEPARTMENT OF CITY PLANNING
THE CITY OF NEW YORK
AUGUST 1956

SCALE IN MILES



SCALE IN FEET





198

[fol. 361]

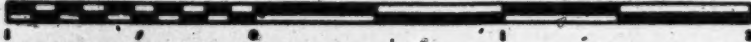
IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 2-C

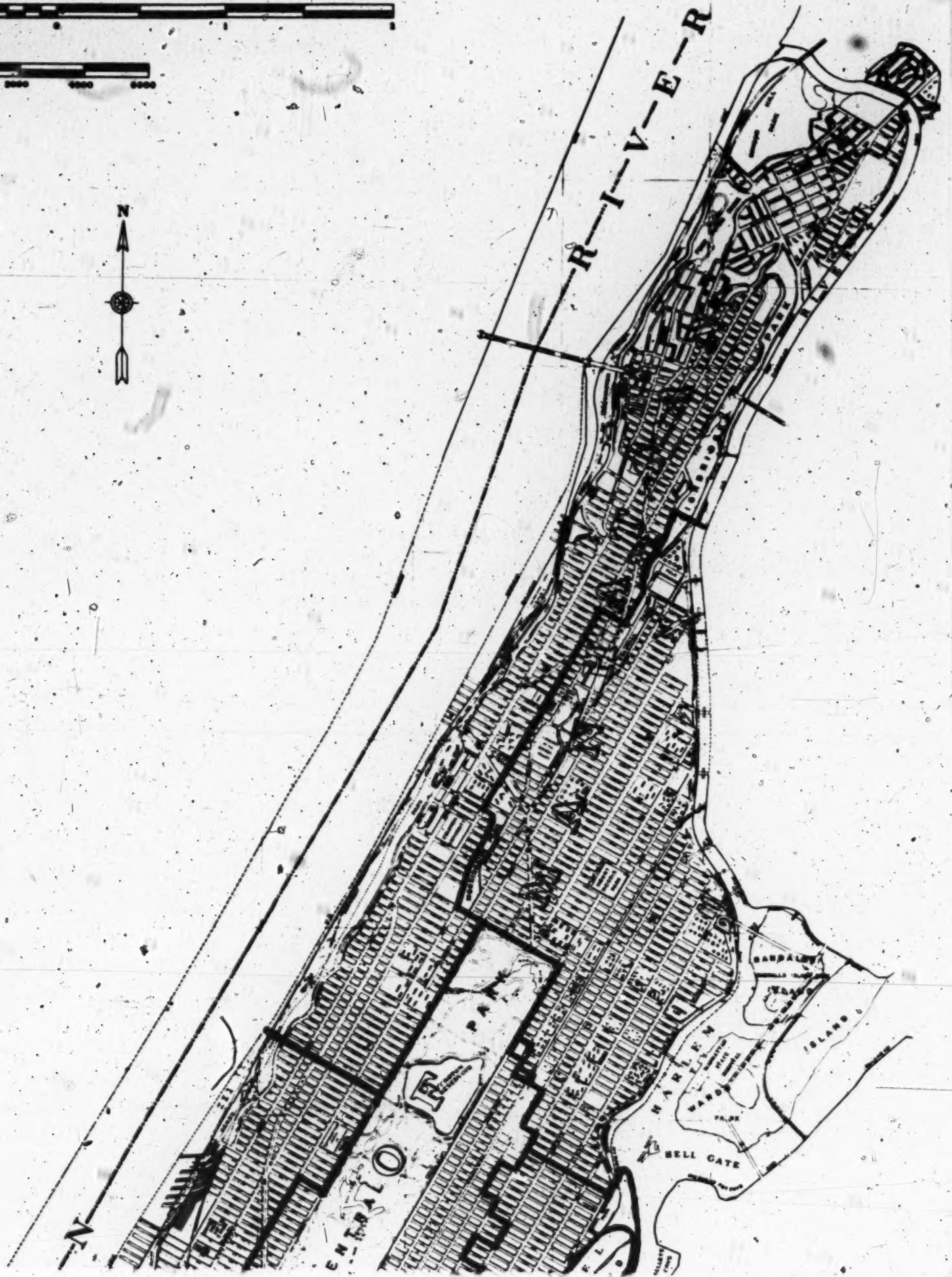
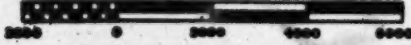
(See opposite) ~~13~~

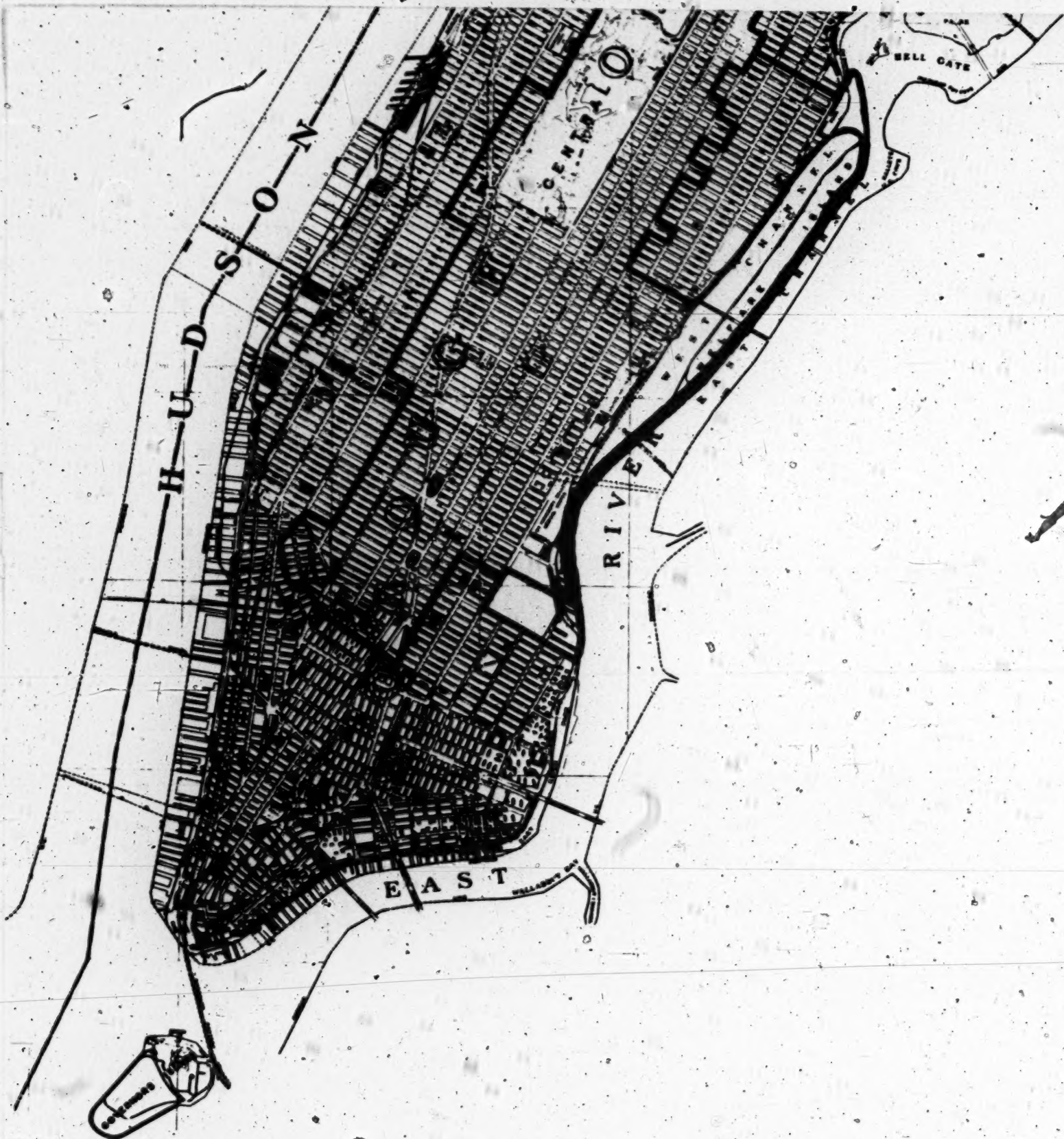
BOROUGH OF MANHATTAN
C DEPARTMENT OF CITY PLANNING
THE CITY OF NEW YORK
AUGUST 1956

SCALE IN MILES



SCALE IN FEET






[fol. 362]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 3

(See opposite) 

The following table, based upon the 1960 census figures, shows the population and racial and group composition of the four districts.

| <u>District</u> | <u>Total Population</u> | <u>White *</u> | | <u>Non-White and Puerto Rican Origin**</u> | |
|-----------------|-------------------------|-------------------|----------------------|--|----------------------|
| | | <u>Population</u> | <u>% of District</u> | <u>Population</u> | <u>% of District</u> |
| 17th | 382,320 | 362,668 | 94.9% | 19,652 | 5.1% |
| 18th | 431,330 | 59,216 | 13.7% | 372,114 | 86.3% |
| 19th | 445,175 | 318,223 | 71.5% | 126,952 | 28.5% |
| 20th | <u>439,456</u> | <u>318,482</u> | <u>72.5%</u> | <u>120,974</u> | <u>27.5%</u> |
| TOTAL | 1,698,281 | 1,058,589 | 62.3% | 639,692 | 37.7% |

The following table shows the per cent of non-white persons and persons of Puerto Rican origin in each Congressional district in relation to the total number of such persons in the entire County:

| <u>District</u> | <u>% of Non-White and Puerto Rican of County</u> |
|-----------------|--|
| 17th | 3.1% |
| 18th | 58.2% |
| 19th | 19.8% |
| 20th | <u>18.9%</u> |
| | 100.0% |

* Excluding persons of Puerto Rican origin.


**At present, the census figures for Puerto Ricans are available only on the basis of census tracts, some of which overlap Congressional District boundaries. The figures in the table tend to overstate the Puerto Rican population in the 17th district. The separate classification of non-white persons and persons of Puerto Rican origin derives from the census figures. See also N.Y. City Board of Education, Toward Greater Opportunity 155 (1960), classifying schools according to their percentage of Negro, Puerto Rican and other students. The breakdown between non-white and Puerto Rican origin by Congressional district is as follows:

| <u>District</u> | <u>Non-White Population</u> | <u>Puerto Rican Origin Population</u> |
|-----------------|-----------------------------|---------------------------------------|
| 17th | 9,103 | 10,549 |
| 18th | 298,011 | 74,103 |
| 19th | 48,175 | 78,777 |
| 20th | <u>71,170</u> | <u>49,804</u> |
| TOTAL | 426,459 | 213,233 |

[fol. 363]

IN UNITED STATES' DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 4 (Plain) AND 4-A (Red)

(See opposite) 

[fol. 365]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PLAINTIFFS' EXHIBIT 5

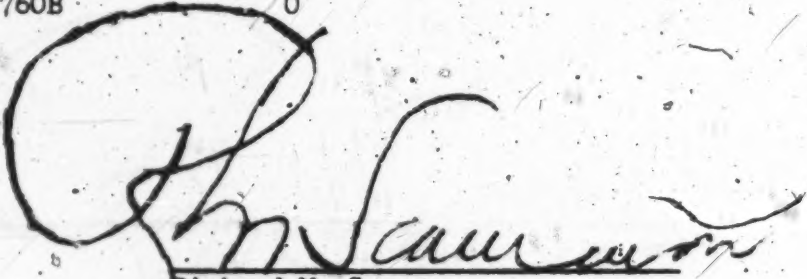
(See opposite) 15

U. S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington 25

August 14, 1962


I. HEREBY CERTIFY, That according to the special hand tally of the 25-percent sample schedules of the 1960 Census of Population, on file in the Bureau of the Census, the number of Puerto Ricans (comprising persons born in Puerto Rico and persons of native parentage with at least one parent born in Puerto Rico) for specified enumeration districts in the borough of Manhattan (County of New York), State of New York, as of April 1, 1960, was as follows:

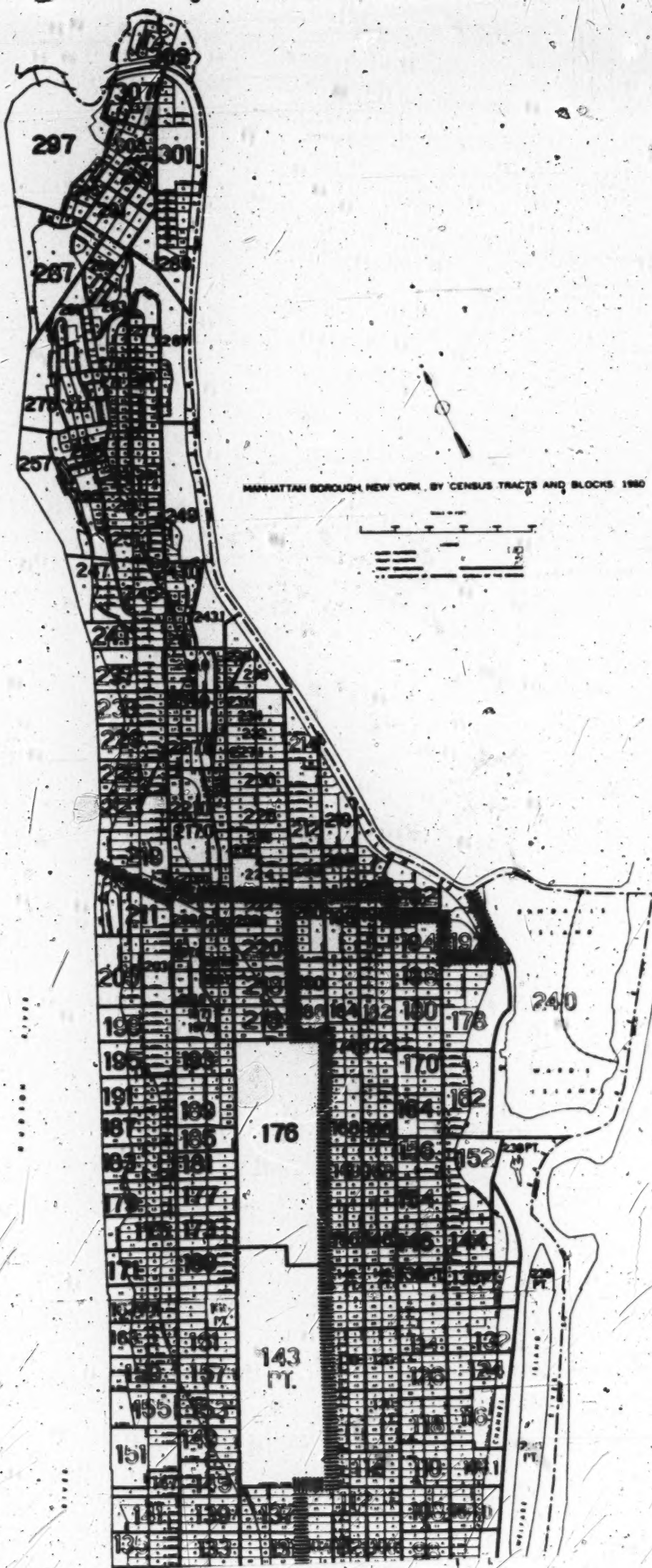
| <u>Enumeration District</u> | <u>Population</u> | <u>Enumeration District</u> | <u>Population</u> | <u>Enumeration District</u> | <u>Population</u> |
|-----------------------------|-------------------|-----------------------------|-------------------|-----------------------------|-------------------|
| 294RA | 8 | 449NB | 0 | 789A | 12 |
| 294RB | 0 | 449NC | 0 | 789B | 0 |
| 294N | 4 | 449ND | 0 | 790A | 12 |
| 295A | 0 | 666 | 32 | 790B | 0 |
| 295B | 0 | 667 | 8 | 791A | 0 |
| 346 | 8 | 668 | 248 | 791B | 68 |
| 347 | 0 | 669A | 176 | 792 | 0 |
| 348 | 16 | 669B | 0 | 793 | 32 |
| 350 | 24 | 670 | 264 | 794 | 16 |
| 364 | 96 | 701A | 0 | 795 | 408 |
| 365N | 0 | 701B | 0 | 796 | 380 |
| 380 | 124 | 726 | 0 | 797 | 176 |
| 385A | 176 | 755 | 0 | 798 | 120 |
| 385B | 0 | 756 | 44 | 800 | 76 |
| 407N | 184 | 757A | 40 | 803 | 12 |
| 407P | 28 | 757B | 0 | 804 | 0 |
| 429 | 28 | 758 | 48 | 805 | 0 |
| 449P | 44 | 759 | 32 | 816P | 0 |
| 449R | 132 | 760A | 4 | 817 | 328 |
| 449NA | 4 | 760B | 0 | | |


Richard M. Scanmon
Director
Bureau of the Census

[fol. 366]

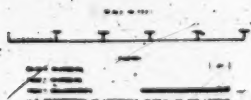
IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
PLAINTIFFS' EXHIBIT 6-A

(See opposite) 






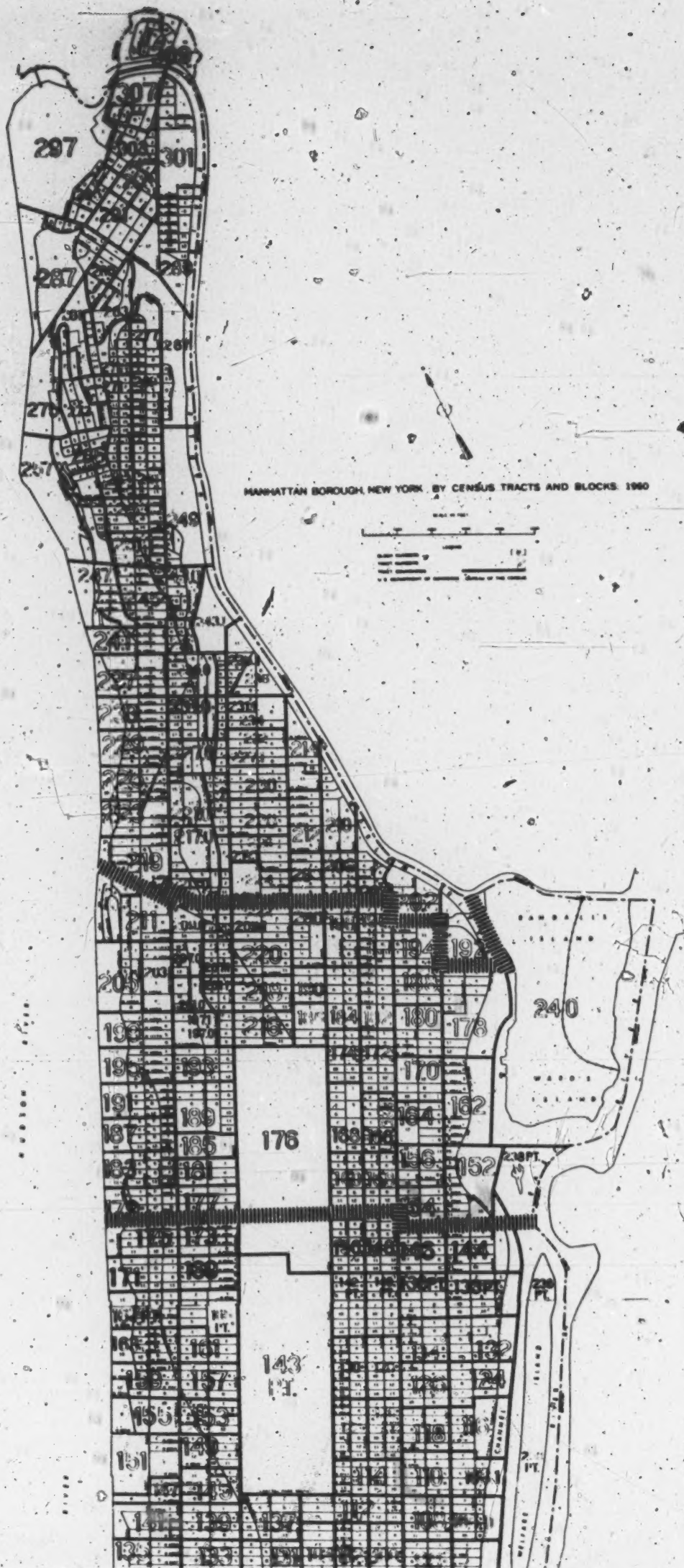
MANHATTAN BOROUGH, NEW YORK
BY CENSUS, TRACTS AND BLOCKS 1960



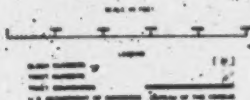
IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 6-B

(See opposite) 

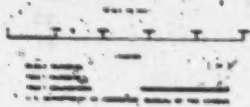


MANHATTAN BOROUGH, NEW YORK, BY CENSUS TRACTS AND BLOCKS, 1960



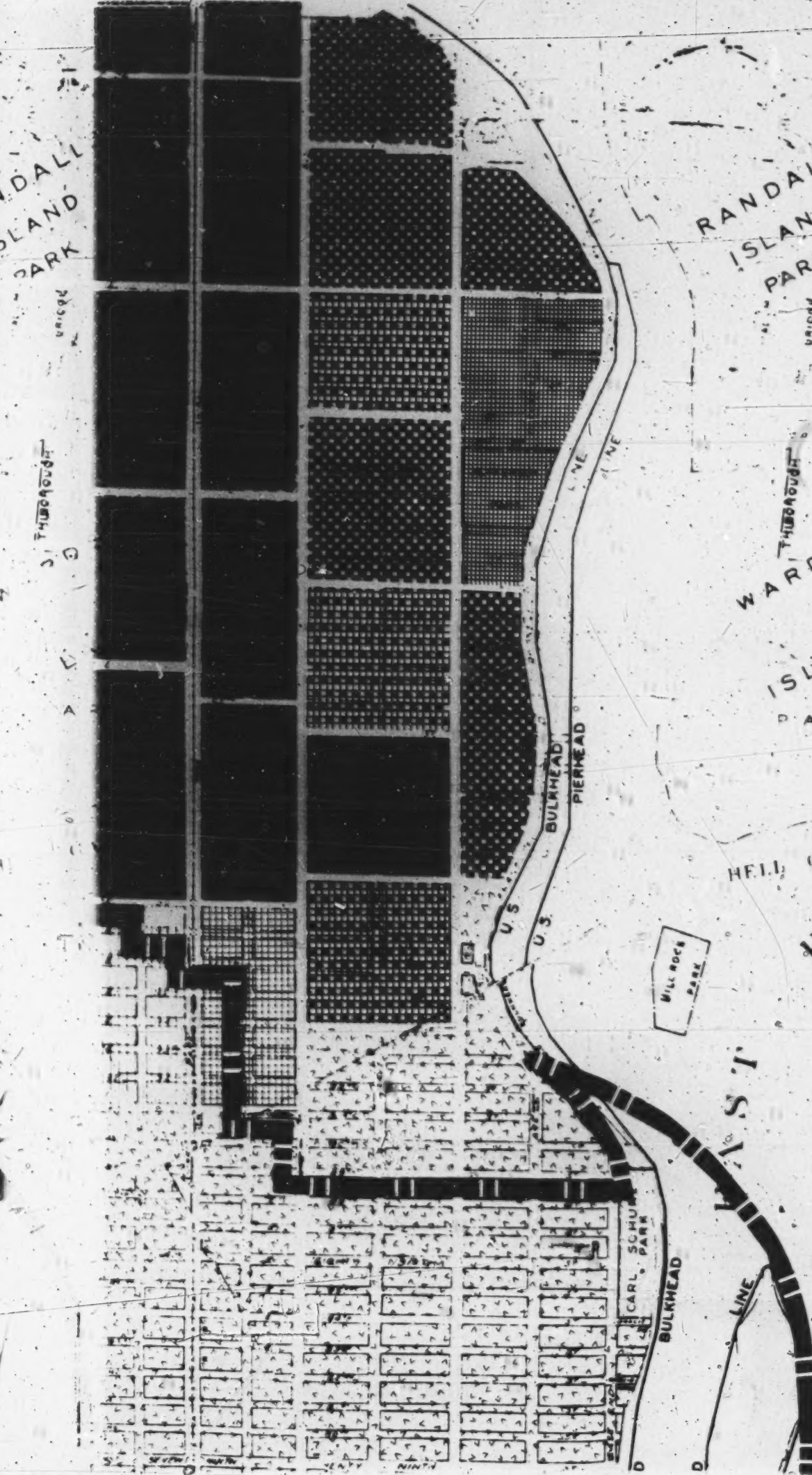
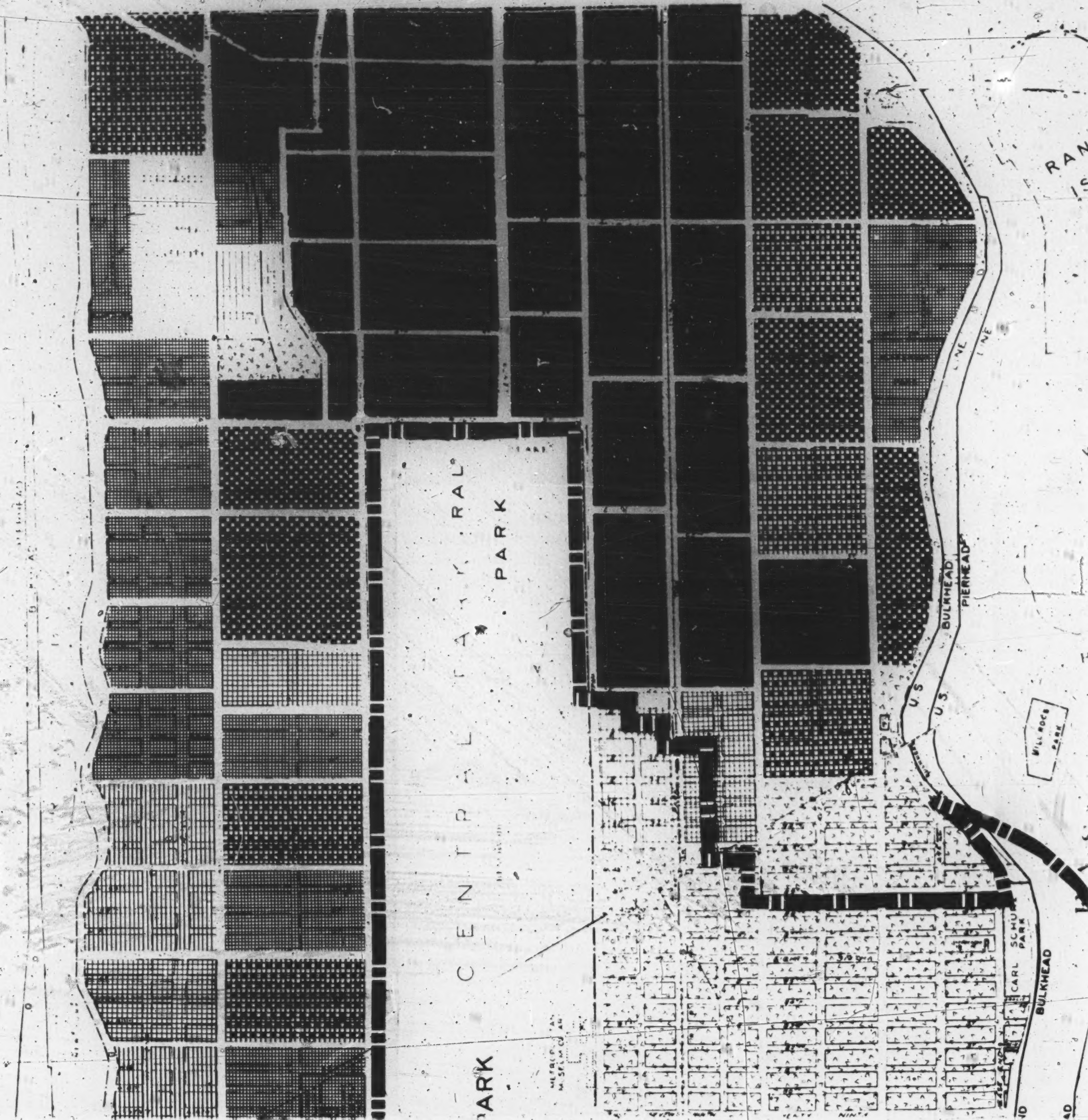


MANHATTAN BOROUGH NEW YORK
BY CENSUS TRACTS AND BLOCKS 1960



RIVER


Hudson



IN UNITED STATES DISTRICT COURT, Southern District of New York
Plaintiff's Exhibit
4 (Plain) +
10/1/21

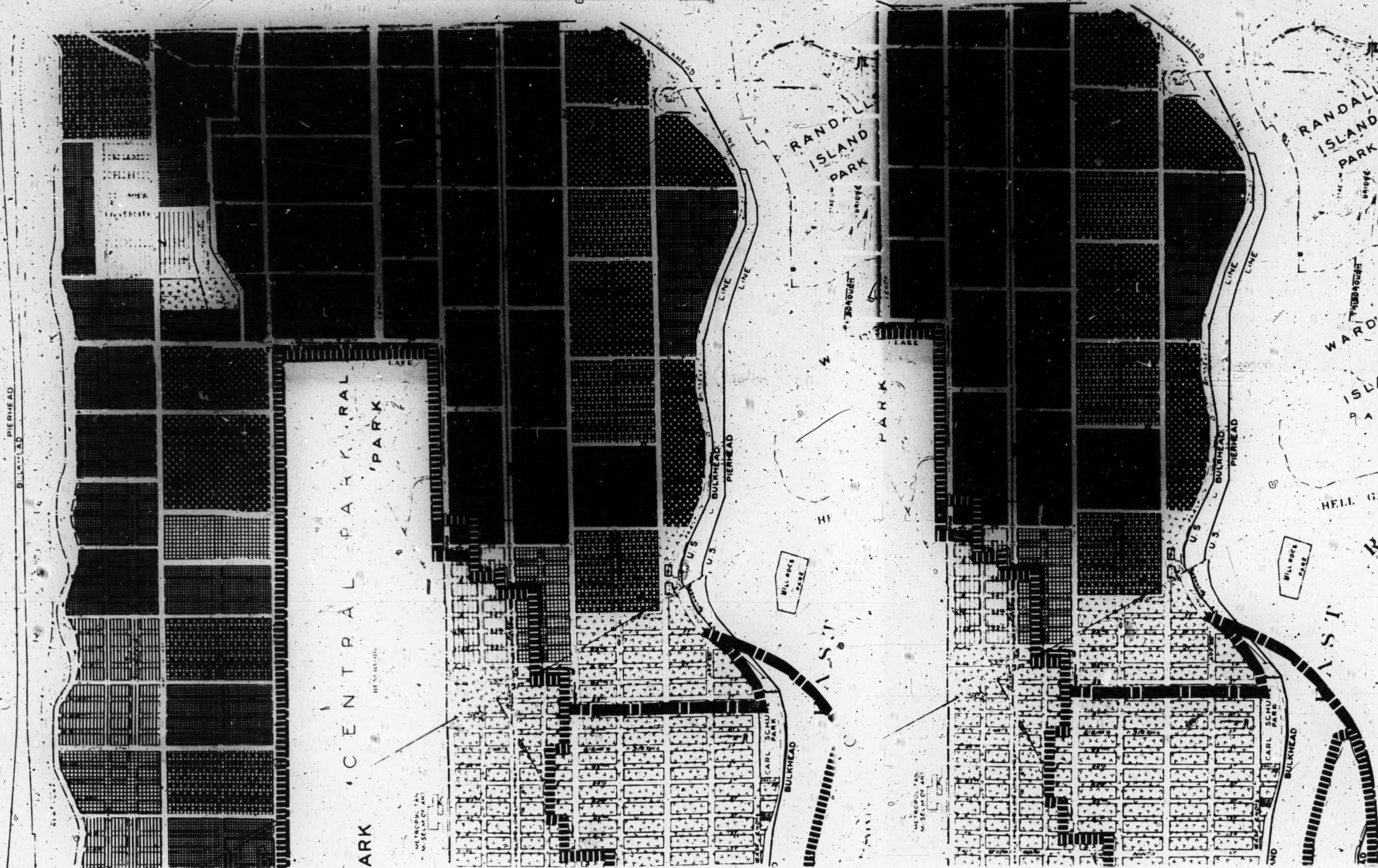
IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 4 (Plain), 4-A (Red), 4-B (Green)

(See opposite) 

RIVER

HUDSON



IN UNITED STATES DISTRICT COURT

Southern District of New York


Plaintiffs Exhibit
4 (Plaintiffs)
4 (Red)
4 (Green)

17TH CONG. DIST.

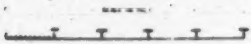
[fol. 368]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

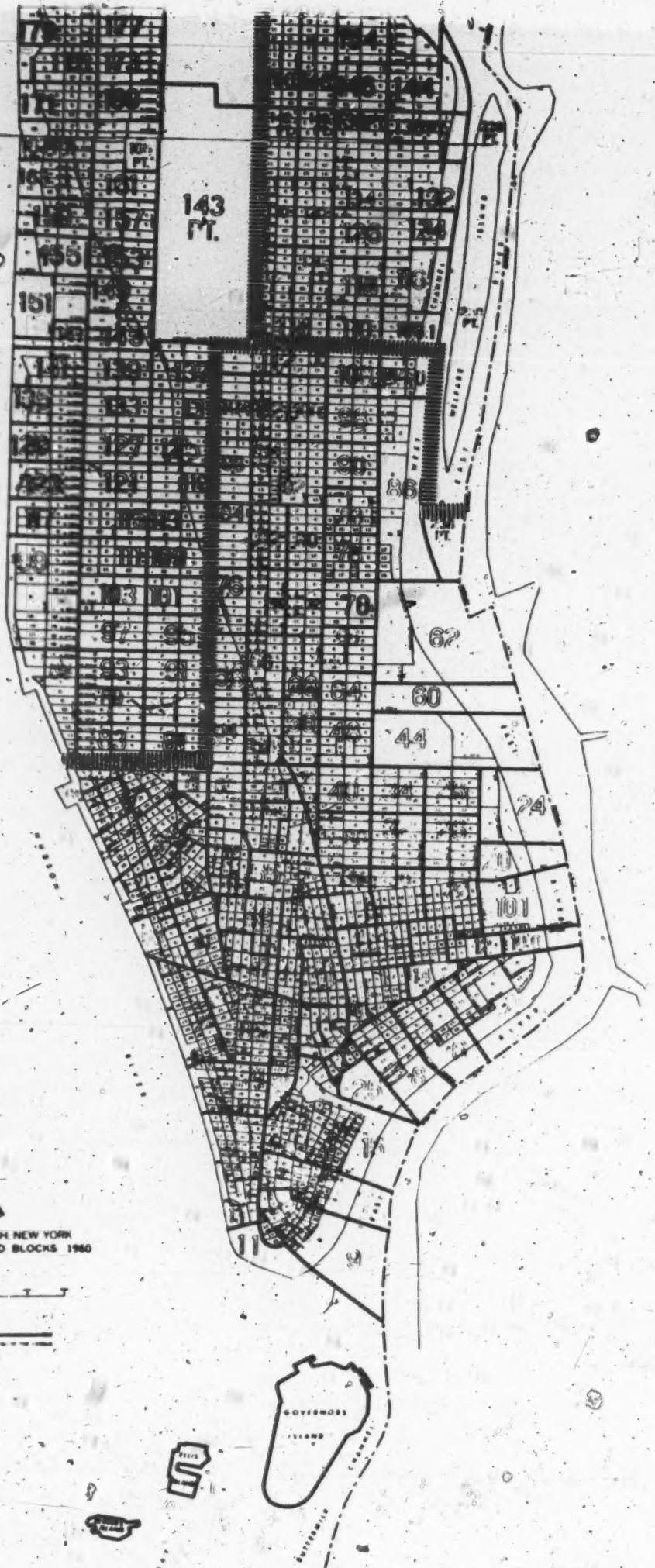
PLAINTIFFS' EXHIBIT 6-C

(See opposite) 

MANHATTAN BOROUGH, NEW YORK
BY CENSUS TRACTS AND BLOCKS 1960

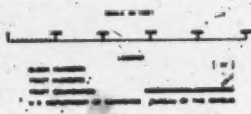


CENSUS TRACTS
 TRACT BOUNDARIES
 BLOCK BOUNDARIES
 U.S. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS





MANHATTAN BOROUGH, NEW YORK, BY CENSUS TRACTS AND BLOCKS: 1980



R
R



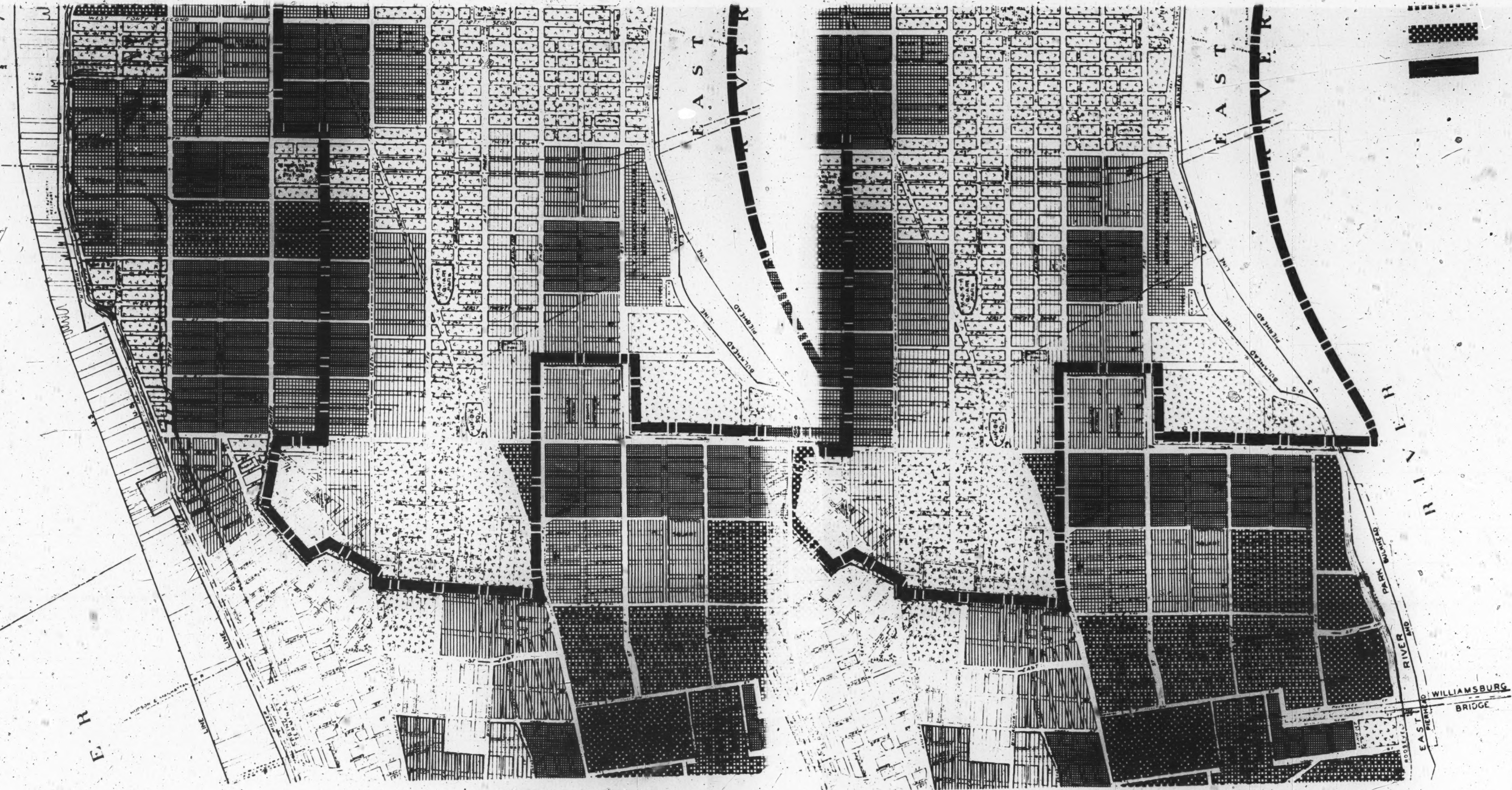
17TH CONG. DIST. AND BOUNDARY AREA STUDY

OLD 17TH
NEW 17TH

WHITE PUERTO RICAN AND NON-WHITE %

| |
|------------|
| 0 - 4.9 |
| 5 - 9.9 |
| 10 - 14.9 |
| 15 - 19.9 |
| 20 - 34.9 |
| 35 - 49.9 |
| 50 - 74.9 |
| 75 - 100.0 |

H U D S O N



50 - 74.9
75 - 100.0

[fol. 369]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 7

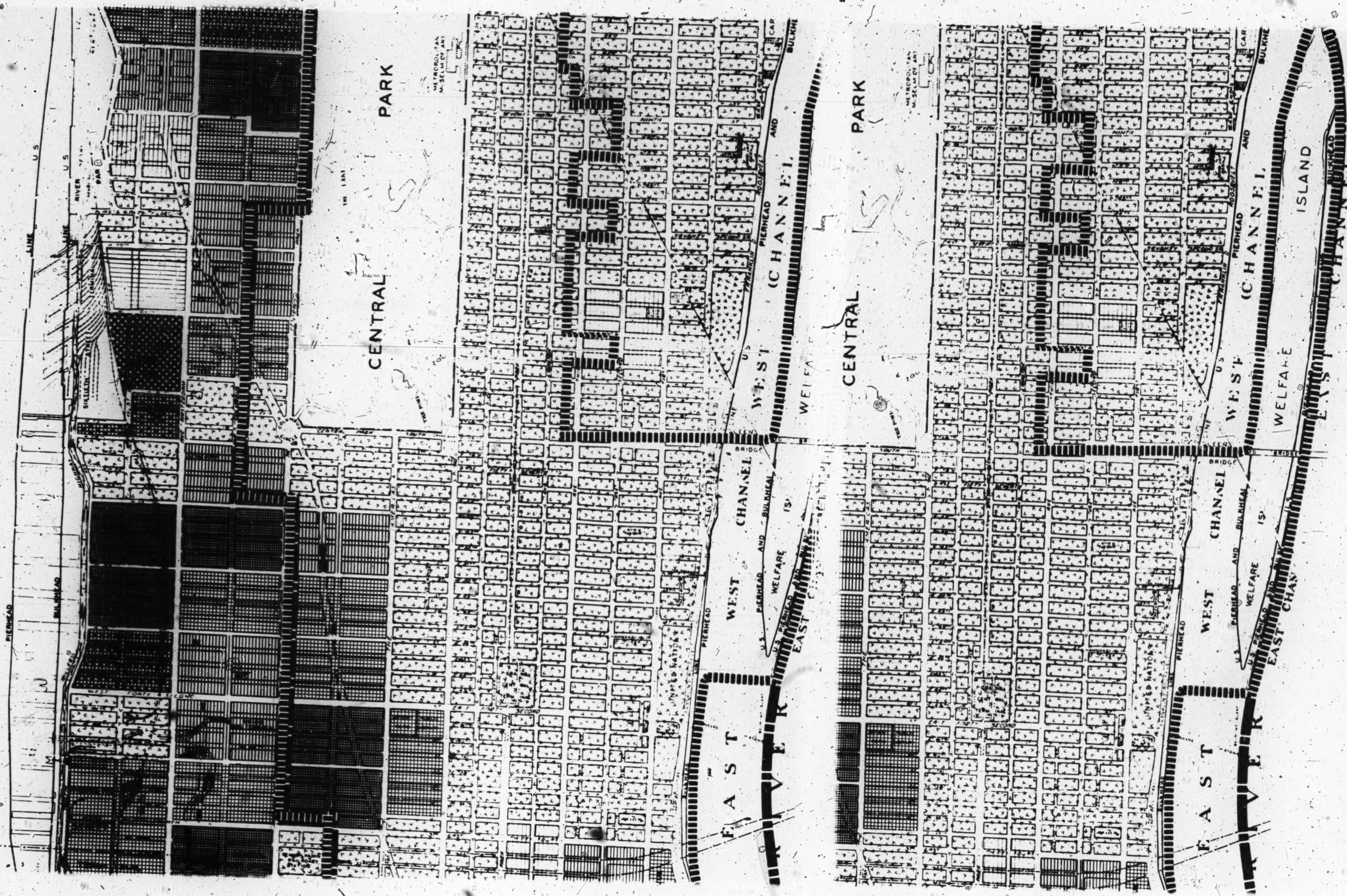
(See opposite) 137

17 TH CONG. DIST. AND BOUNDARY AREA STUDY

OLD 17 TH
NEW 17 TH

WHITE PUERTO RICAN
AND NON - WHITE
%

| |
|------------|
| 0 - 4.9 |
| 5 - 9.9 |
| 10 - 14.9 |
| 15 - 19.9 |
| 20 - 34.9 |
| 35 - 49.9 |
| 50 - 74.9 |
| 75 - 100.0 |



NEW YORK CITY HOUSING AUTHORITY

MEMBERS
WILLIAM REID
CHAIRMAN
FRANCIS V. MADIGAN
VICE-CHAIRMAN
IRA S. ROBBINS

299 BROADWAY • NEW YORK 7, N. Y.

GERALD J. CAREY
GENERAL MANAGER
HAROLD KLOSFEIN
SECRETARY

August 28, 1962

Justin N. Feldman, Esq.
415 Madison Avenue
New York 17, New York

Dear Mr. Feldman:

This will confirm the oral advice previously given you over the telephone.

The official records of the New York City Housing Authority would indicate that pursuant to approval of the Board of Estimate of the City of New York on May 28, 1959, Gerard Swope Houses, a publicly assisted low-cost housing project, was planned for the area between the East River and First Avenue and from 93rd Street to 95th Street in Manhattan. Thereafter, an extension of the project, to be known as Gerard Swope South, was recommended by the New York City Housing Authority as an extension of the original project for the area immediately south of Gerard Swope Houses. The tentative boundaries, which are still being studied, are from 91st Street to 93rd Street and from York Avenue to First Avenue in Manhattan.

In response to the second question asked by you, please be informed that the records of the New York City Housing Authority indicate that for the 28 publicly assisted low-cost housing projects in Manhattan the racial and ethnic divisions are as follows:

| | <u>Number of Tenants</u> | <u>Percentage of Total</u> |
|-------------------|--------------------------|----------------------------|
| White | 8,713 | 26.6 |
| Negro | 13,442 | 41.0 |
| Puerto Rican | 10,182 | 31.0 |
| Chinese and Other | 467 | 1.4 |
| Total | <u>32,804</u> | <u>100.0</u> |

Very truly yours,


Oscar Kanny
Director of Public Relations
and Information

216

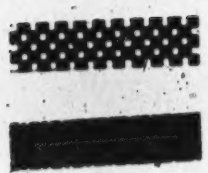
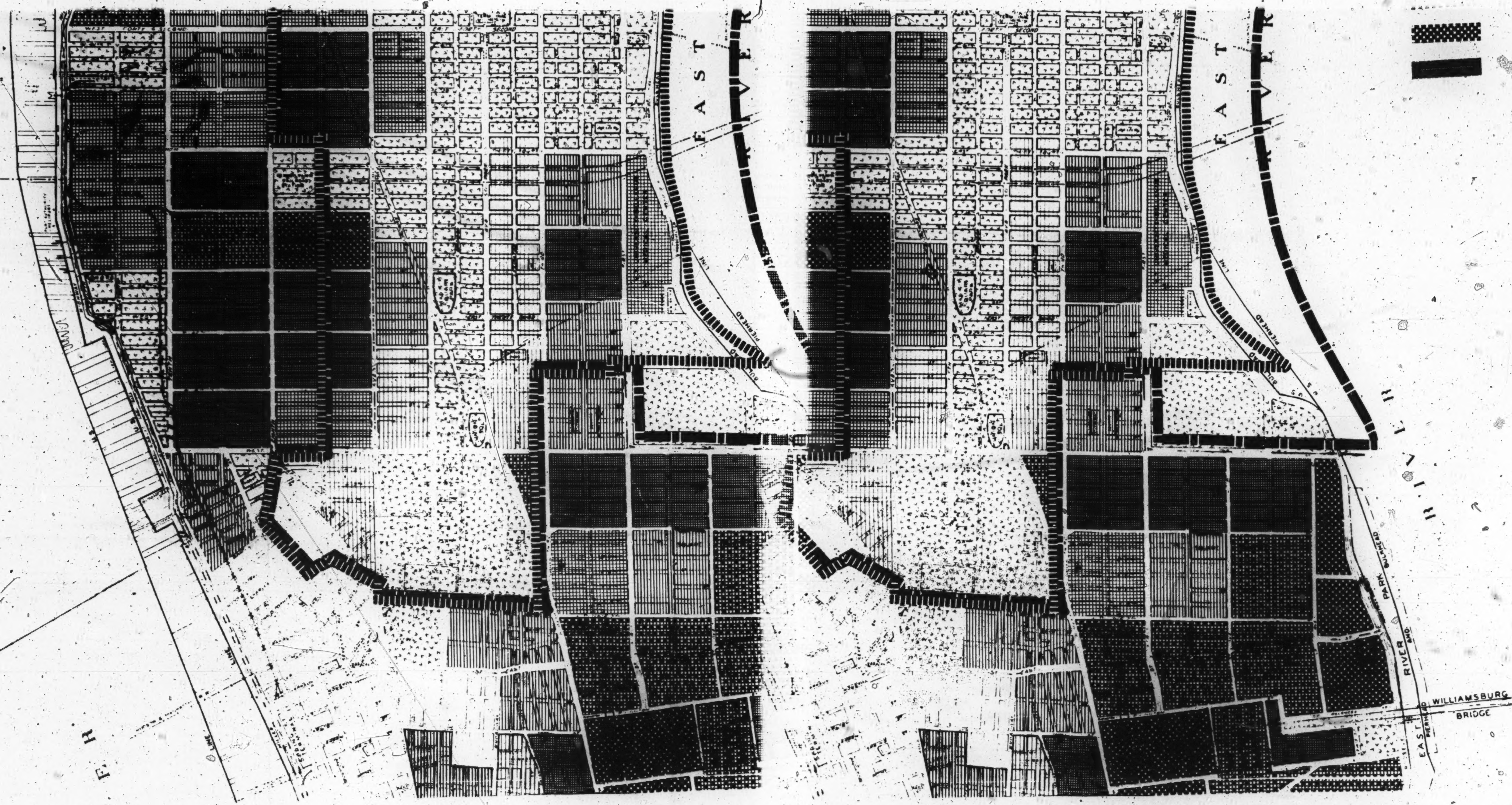
[fol. 370]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT A

(See opposite) 

N
H
U
D
S
O
N



50 - 74.9
75 - 100.0

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
WASHINGTON

AUG 9 1962


I hereby certify, that according to a preliminary tabulation of the returns of the EIGHTEENTH DECENNIAL CENSUS OF THE UNITED STATES, on file in the Bureau of the Census, the distribution by race of the total population, and the number of persons of Puerto Rican birth or parentage, residing (1) in the current (i.e., 87th Congress) Seventeenth Congressional District of New York, (2) the new Seventeenth Congressional District, (3) in the current Seventeenth Congressional District but not in the new Seventeenth, and (4) in the new Seventeenth Congressional District but not in the current Seventeenth, are as shown in the table below:

| Congressional District | Total | White | Negro | Other | Total persons of Puerto Rican birth or parentage |
|--|---------|---------|-------|-------|--|
| Current 17th, New York | 260,235 | 252,440 | 5,291 | 2,504 | 9,687 |
| New 17th, New York | 382,320 | 372,896 | 6,183 | 3,241 | 10,529 |
| In current 17th, not in new 17th, New York | 806 | 657 | 136 | 13 | 386 |
| In new 17th, not in current 17th, New York | 122,891 | 121,113 | 1,028 | 750 | 1,228 |

Richard M. Scammon
Richard M. Scammon, Director
Bureau of the Census

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT B

(See opposite) 

**STATEMENT RELATING TO THE EIGHTEENTH
DECENNIAL CENSUS OF THE POPULATION**

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

**A STATEMENT PREPARED BY THE DIRECTOR OF THE
CENSUS, DEPARTMENT OF COMMERCE, RELATING TO
THE EIGHTEENTH DECENNIAL CENSUS OF THE POPU-
LATION, PURSUANT TO SECTION 22(a) OF THE ACT OF
JUNE 18, 1929, AS AMENDED (2 U.S.C. 2a)**



**JANUARY 12, 1961.—Referred to the Committee on the Judiciary and
ordered to be printed with illustrations**

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1961

64161

LETTER OF TRANSMITTAL

To the Congress of the United States:

Pursuant to the provisions of section 22(a) of the act of June 18, 1929, as amended (2 U.S.C. 2a), I transmit herewith a statement prepared by the Director of the Census, Department of Commerce, showing (1) the whole number of persons in each State, as ascertained by the Eighteenth Decennial Census of the population, and (2) the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives by the method of equal proportions.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *January 10, 1961.*

III

MEMORANDUM

U.S. DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS,
November 15, 1960.

To: Hon. Frederick H. Mueller, Secretary of Commerce.
From: Robert W. Burgess, Director, Bureau of the Census.
Subject: Population of the United States for the apportionment of Representatives.

In accordance with the provisions of title 13, United States Code, section 141(b); title 2, United States Code, sections 2a, 2b (55 Stat. 761); Public Law 85-508 (72 Stat. 339), and Public Law 86-3 (73 Stat. 4), I transmit herewith a statement showing the population of each State and the District of Columbia on April 1, 1960, as ascertained by the Eighteenth Decennial Census of the United States, and the number of Representatives to which each State is entitled. This statement furnishes the information which the statute requires to be transmitted by the President to the 87th Congress in the 1st week of its 1st regular session.

The apportionment of Representatives shown in table 1 was in accordance with the method of equal proportions, as prescribed by law. The total population of each State includes all Indians, since all Indians are now subject to Federal taxation. This is in accordance with the procedure followed in 1940 and 1950. Since the accession of Alaska and Hawaii as States, there are now 437 seats in the House of Representatives, but according to law this reverts to 435. For this reason these computations are for a House with 435 Members.

The Eighteenth Decennial Census reveals an unprecedented growth of our population, amounting to more than 28 million in the last 10 years, and impressive changes in the internal distribution of the population. (See table 2.) The long-time westward movement of the population has continued at an increasing pace, and as in the previous decade, the West, comprising Pacific and Mountain States, led the four regions in the amount as well as the rate of growth between successive decennial censuses. California, with an increase of more than 5 million, and Florida with an increase of more than 2 million, led the States in population growth during the decade. Only three States—West Virginia, Mississippi, and Arkansas—lost population. These and other population changes are reflected in the new apportionment, which shows 9 States gaining and 10 States losing 1 or more Representatives.

1

2 RELATING TO THE EIGHTEENTH DECENNIAL CENSUS

TABLE 1.—Population of the United States by States, 1960, and apportionment of Representatives in Congress, 1960 and 1960

| State | Population, 1960 | Present number of Representatives | Apportionment of 435 Representatives according to 1960 population | | |
|----------------------|------------------|-----------------------------------|---|---|----------|
| | | | Number | Change from present number of Representatives | |
| | | | | Increase | Decrease |
| United States | 179,332,175 | 437 | 435 | 19 | 21 |
| Alabama | 2,298,740 | 9 | 8 | 0 | 1 |
| Alaska | 236,167 | 1 | 1 | | |
| Arizona | 1,302,161 | 2 | 3 | 1 | |
| Arkansas | 1,796,272 | 6 | 4 | | 2 |
| California | 15,717,204 | 30 | 38 | 8 | |
| Colorado | 1,758,947 | 4 | 4 | | |
| Connecticut | 2,535,234 | 6 | 6 | | |
| Delaware | 446,260 | 1 | 1 | | |
| District of Columbia | 753,956 | | | | |
| Florida | 4,961,500 | 8 | 12 | 4 | |
| Georgia | 3,943,119 | 10 | 10 | | |
| Hawaii | 632,772 | 1 | 2 | 1 | |
| Idaho | 667,191 | 2 | 2 | | |
| Illinois | 10,061,156 | 25 | 24 | | 1 |
| Indiana | 4,662,466 | 11 | 11 | | |
| Iowa | 2,787,537 | 6 | 7 | | 1 |
| Kansas | 2,178,611 | 6 | 5 | | 1 |
| Kentucky | 3,096,166 | 8 | 7 | | 1 |
| Louisiana | 3,287,023 | 6 | 8 | | |
| Maine | 906,265 | 2 | 2 | | 1 |
| Maryland | 3,100,660 | 7 | 8 | 1 | |
| Massachusetts | 3,146,578 | 14 | 12 | | 2 |
| Michigan | 7,823,194 | 18 | 19 | 1 | |
| Minnesota | 3,412,964 | 9 | 8 | | 1 |
| Mississippi | 2,178,141 | 6 | 5 | | 1 |
| Missouri | 4,319,612 | 11 | 10 | | 1 |
| Montana | 674,767 | 2 | 2 | | |
| Nebraska | 1,411,320 | 4 | 3 | | 1 |
| Nevada | 285,276 | 1 | 1 | | |
| New Hampshire | 606,921 | 2 | 2 | | |
| New Jersey | 6,066,782 | 14 | 15 | 1 | |
| New Mexico | 951,023 | 2 | 2 | | |
| New York | 16,782,304 | 43 | 41 | | 2 |
| North Carolina | 4,566,155 | 12 | 11 | | 1 |
| North Dakota | 632,446 | 2 | 2 | | |
| Ohio | 9,706,397 | 33 | 24 | | 1 |
| Oklahoma | 2,328,264 | 6 | 6 | | |
| Oregon | 1,708,687 | 4 | 4 | | |
| Pennsylvania | 11,319,366 | 30 | 27 | | 3 |
| Rhode Island | 836,496 | 2 | 2 | | |
| South Carolina | 2,362,594 | 6 | 6 | | |
| South Dakota | 690,514 | 2 | 2 | | |
| Tennessee | 3,567,090 | 9 | 9 | | |
| Texas | 9,579,677 | 22 | 23 | 1 | |
| Utah | 940,627 | 2 | 2 | | |
| Vermont | 269,861 | 1 | 1 | | |
| Virginia | 3,946,946 | 10 | 10 | | |
| Washington | 2,833,214 | 7 | 7 | | |
| West Virginia | 1,860,421 | 6 | 5 | | 1 |
| Wisconsin | 3,951,777 | 10 | 10 | | |
| Wyoming | 330,068 | 1 | 1 | | |

RELATING TO THE EIGHTEENTH DECENNIAL CENSUS

TABLE 2.—Population of United States by regions, divisions, and States, 1900 and 1950

Minus sign (—) denotes decrease

| Region, division, and State | Population | | Increase, 1900-50 | Percent increase | |
|-----------------------------|-------------|-------------|----------------------|------------------|---------|
| | 1900 | 1950 | | 1900-50 | 1940-50 |
| United States..... | 179,323,175 | 181,325,706 | 27,997,577 | 15.5 | 14.5 |
| Regions: | | | | | |
| Northeast..... | 44,677,819 | 39,477,006 | 5,190,833 | 13.2 | 9.7 |
| North Central..... | 51,619,130 | 44,686,782 | 7,188,377 | 16.1 | 10.8 |
| South..... | 54,973,113 | 47,197,098 | 7,776,025 | 16.5 | 12.3 |
| West..... | 28,053,104 | 20,186,952 | 7,866,142 | 38.9 | 40.4 |
| Northeast: | | | | | |
| New England..... | 10,506,367 | 9,314,453 | 1,194,914 | 12.8 | 10.4 |
| Middle Atlantic..... | 34,108,482 | 30,162,533 | 4,004,919 | 13.3 | 9.5 |
| North Central: | | | | | |
| East North Central..... | 36,223,024 | 30,396,306 | 5,825,656 | 16.2 | 14.2 |
| West North Central..... | 15,394,115 | 14,081,364 | 1,312,721 | 9.5 | 4.0 |
| South: | | | | | |
| South Atlantic..... | 25,971,732 | 21,182,335 | 4,789,397 | 22.6 | 18.8 |
| East South Central..... | 12,080,126 | 11,477,181 | 572,945 | 5.0 | 6.5 |
| West South Central..... | 16,931,255 | 14,887,575 | 2,043,680 | 16.6 | 11.3 |
| West: | | | | | |
| Mountain..... | 6,855,090 | 5,074,996 | 1,780,092 | 35.1 | 22.3 |
| Pacific..... | 21,198,044 | 15,114,964 | 6,083,080 | 40.2 | 47.8 |
| New England: | | | | | |
| Maine..... | 900,265 | 913,774 | 55,491 | 6.1 | 7.9 |
| New Hampshire..... | 606,921 | 533,242 | 73,679 | 13.6 | 8.5 |
| Vermont..... | 300,060 | 377,747 | 12,134 | 3.2 | 5.2 |
| Massachusetts..... | 5,148,578 | 4,080,514 | 478,064 | 9.5 | 8.7 |
| Rhode Island..... | 859,498 | 791,866 | 67,592 | 8.5 | 11.0 |
| Connecticut..... | 2,535,234 | 2,007,380 | 527,854 | 26.3 | 17.4 |
| Middle Atlantic: | | | | | |
| New York..... | 16,782,304 | 14,830,192 | 1,952,112 | 13.2 | 10.0 |
| New Jersey..... | 6,096,782 | 4,835,329 | 1,231,453 | 25.5 | 16.2 |
| Pennsylvania..... | 11,319,366 | 10,406,012 | 823,354 | 7.8 | 6.0 |
| East North Central: | | | | | |
| Ohio..... | 9,706,397 | 7,940,027 | 1,780,770 | 22.1 | 15.0 |
| Indiana..... | 4,662,498 | 3,934,224 | 728,274 | 18.5 | 14.8 |
| Illinois..... | 10,081,158 | 8,712,176 | 1,368,982 | 15.7 | 10.3 |
| Michigan..... | 7,823,194 | 6,371,766 | 1,451,428 | 22.8 | 21.2 |
| Wisconsin..... | 3,951,777 | 3,434,575 | 517,202 | 15.1 | 9.5 |
| West North Central: | | | | | |
| Minnesota..... | 3,413,864 | 2,982,483 | 431,381 | 14.5 | 6.8 |
| Iowa..... | 2,757,537 | 2,621,073 | 136,464 | 5.2 | 3.3 |
| Missouri..... | 4,319,813 | 3,954,653 | 365,160 | 9.2 | 4.5 |
| North Dakota..... | 632,446 | 619,636 | 12,810 | 2.1 | -3.5 |
| South Dakota..... | 690,514 | 632,740 | 27,774 | 4.3 | 1.5 |
| Nebraska..... | 1,417,330 | 1,325,510 | 85,820 | 6.5 | 7.7 |
| Kansas..... | 2,178,611 | 1,906,290 | 273,312 | 14.3 | 5.8 |
| South Atlantic: | | | | | |
| Delaware..... | 446,292 | 318,065 | 128,207 | 40.3 | 19.4 |
| Maryland..... | 3,100,699 | 2,343,001 | 757,698 | 32.3 | 28.6 |
| District of Columbia..... | 763,856 | 802,178 | -38,222 | -4.8 | 21.0 |
| Virginia..... | 3,966,949 | 3,318,680 | 648,269 | 19.5 | 23.9 |
| West Virginia..... | 1,890,421 | 2,005,582 | -145,131 | -7.2 | 5.4 |
| North Carolina..... | 4,556,158 | 4,061,929 | 494,226 | 12.2 | 13.7 |
| South Carolina..... | 2,382,594 | 2,117,027 | 265,567 | 12.5 | 11.4 |
| Georgia..... | 3,943,116 | 3,444,578 | 498,538 | 14.5 | 10.3 |
| Florida..... | 4,951,580 | 2,771,305 | 2,180,255 | 78.7 | 46.1 |
| East South Central: | | | | | |
| Kentucky..... | 3,094,156 | 2,944,806 | 93,350 | 3.2 | 3.5 |
| Tennessee..... | 3,567,089 | 3,291,718 | 275,371 | 8.4 | 12.9 |
| Alabama..... | 2,266,740 | 2,061,748 | 204,997 | 6.7 | 8.1 |
| Mississippi..... | 2,178,141 | 2,178,914 | -773 | (1) | -2 |
| West South Central: | | | | | |
| Arkansas..... | 1,786,273 | 1,909,511 | -123,238 | -6.5 | -2.0 |
| Louisiana..... | 3,257,022 | 2,683,516 | 573,506 | 21.4 | 13.5 |
| Oklahoma..... | 2,328,284 | 2,233,381 | 94,903 | 4.3 | -4.4 |
| Texas..... | 9,579,677 | 7,711,194 | 1,868,483 | 24.2 | 20.2 |
| Mountain: | | | | | |
| Montana..... | 674,787 | 591,024 | 83,743 | 14.2 | 5.6 |
| Idaho..... | 667,191 | 588,637 | 78,554 | 13.3 | 12.1 |
| Wyoming..... | 330,066 | 290,529 | 39,537 | 13.6 | 15.9 |
| Colorado..... | 1,753,947 | 1,325,089 | 428,858 | 32.4 | 18.0 |
| New Mexico..... | 951,023 | 691,187 | 259,836 | 39.6 | 28.1 |
| Arizona..... | 7,302,161 | 749,587 | 552,574 | 73.7 | 50.1 |
| Utah..... | 890,627 | 698,862 | 191,765 | 29.3 | 25.2 |
| Nevada..... | 285,278 | 160,063 | 125,195 | 78.2 | 45.2 |

1 Less than 0.1 percent.

TABLE 2.—Population of United States by regions, divisions, and States, 1960 and 1950—Continued

| Region, division, and State | Population | | Increase, 1950-60 | Percent increase | |
|-----------------------------|------------|------------|----------------------|------------------|---------|
| | 1950 | 1960 | | 1950-60 | 1940-50 |
| Pacific: | | | | | |
| Washington..... | 2,853,314 | 2,378,963 | 474,251 | 19.9 | 37.0 |
| Oregon..... | 1,768,687 | 1,521,341 | 247,346 | 16.3 | 39.6 |
| California..... | 15,717,204 | 10,586,223 | 5,130,981 | 48.5 | 53.2 |
| Alaska..... | 226,167 | 128,643 | 97,524 | 75.8 | 77.4 |
| Hawaii..... | 632,772 | 490,704 | 132,978 | 26.6 | 18.1 |

THE 1960-CENSUS OF POPULATION—ADVANCE REPORTS, FINAL POPULATION COUNTS, NOVEMBER 15, 1960¹

UNITED STATES

(These figures supersede the preliminary counts for the same areas published in the PC(P1) series of reports. The present series consists of 52 reports—one each for the United States, 50 States, and the District of Columbia—which are numbered in alphabetical order rather than in order of publication. As of this date, 23 of the State reports have been published. The reports for the remaining States will be published within the next several weeks.)

The population of the United States, increased by a record 28 million in the 10 years ending April 1, 1960, according to the final count of the returns of the 1960 Census of Population. This increase exceeded the former alltime record for the previous decade by 8.8 million (table 1).

The final total for the 50 States and the District of Columbia is 179,323,175 as against a final population count of 151,325,798 for 1950. The 1960 total does not include members of the Armed Forces and their dependents living abroad, crews of American vessels at sea or in foreign ports, and American citizens living in foreign countries. Neither does it include the inhabitants of Puerto Rico, the Virgin Islands, and other outlying areas under the American flag.

Apportionment

Table 3 presents the current membership of the House of Representatives and the apportionment of 435 Members based on the results of the 1960 census. Membership was increased temporarily to 437 with the admission of Alaska and Hawaii as States. According to present legislation, membership will revert to 435. In the absence of congressional action to the contrary, the apportionment based on the 1960 census will result in gains in the delegations of 9 States and losses in those of 16 States. The largest gains are scheduled for California, eight seats, and Florida, four seats. Other States standing to gain are New Jersey, Ohio, Michigan, Maryland, Texas, Arizona, and Hawaii. The largest loss, three seats, is scheduled for Pennsylvania. States which will lose two seats are Massachusetts, New York, and Arkansas.

¹ U.S. Department of Commerce, Frederick H. Mueller, Secretary, Bureau of the Census, Robert W. Burgess, Director.

Regions

As in the previous decade, the West led the regions in both the amount and rate of growth (table 2). The population of the West increased by 7.9 million, or 38.9 percent. The West was the only region in which the rate of growth was greater than the 18.5 percent increase for the Nation as a whole. The most populous region, the South, ranked second in the amount of growth—7.8 million—and its rate of growth—16.5 percent—was slightly higher than that of the north central region. Gains of 7.2 and 5.2 million were recorded in the north central region and the Northeast, respectively. The latter region had the smallest rate of gain—13.2 percent.

Divisions

The two divisions in the West—Pacific and Mountain—led the divisions in the rates of growth, with increases of 40.2 and 35.1 percent, respectively. The Pacific division also had the largest absolute increase—6.1 million. The 5.8 million gain for the East North Central States was second to that of the Pacific States. This division and the South Atlantic were the only divisions other than those in the West which had a rate of growth in excess of that for the Nation.

States

The final counts for the States show that New York continues to be the most populous and Alaska the least populous State (table 4). The nine highest ranking States in 1960 were New York, California, Pennsylvania, Illinois, Ohio, Texas, Michigan, New Jersey, and Massachusetts. These States were also the highest ranking in the same order in 1950. Florida, however, advanced from the 20th State in order of population size to the 10th State, and there were some additional minor changes in ranking among other States.

California surpassed all the States in the amount of growth since 1950 (table 5). The 5.1 million gain for this State accounted for nearly one-fifth of the increase for the United States. Second to California in the amount of growth was Florida, with an increase of 2.2 million. Other States with gains of more than 1 million were New York, Texas, Ohio, Michigan, Illinois, and New Jersey. Eight States had increases of 500,000 to 1 million. These 16 States accounted for 22.1 million, or four-fifths of the increase for the Nation as a whole. On the other hand, two States—Arkansas and West Virginia—and the District of Columbia lost population. The population of Mississippi remained practically unchanged—2,178,141 in 1960 as compared with 2,178,914 in 1950.

Florida had the largest rate of growth—78.7 percent. Three additional States—Nevada, Alaska, and Arizona—had increases in excess of 70 percent, and 15 additional States, including Hawaii, our newest State, grew at a more rapid rate than the country as a whole.

RELATING TO THE EIGHTEENTH DECENNIAL CENSUS

TABLE 1.—Population of the United States, 1790 to 1960

[Includes data for Alaska since 1870 and Hawaii since 1900]

| Census date | Population | Increase over preceding census | | Census date | Population | Increase over preceding census | |
|----------------------|-------------|--------------------------------|---------|---------------------|------------|--------------------------------|---------|
| | | Number | Percent | | | Number | Percent |
| 1790 (Apr. 1) | 179,323,175 | 27,997,377 | 18.5 | 1870 (June 1) | 38,558,371 | 7,115,060 | 22.6 |
| 1800 (Apr. 1) | 151,325,798 | 19,161,229 | 14.5 | 1880 (June 1) | 31,443,321 | 8,251,445 | 35.6 |
| 1840 (Apr. 1) | 123,164,589 | 8,961,945 | 7.3 | 1890 (June 1) | 23,191,878 | 6,123,423 | 35.9 |
| 1850 (Apr. 1) | 123,202,634 | 17,181,087 | 16.2 | 1840 (June 1) | 17,069,453 | 4,203,433 | 22.7 |
| 1860 (Jan. 1) | 106,021,537 | 13,793,041 | 15.0 | 1850 (June 1) | 12,886,080 | 3,227,567 | 33.5 |
| 1910 (Apr. 15) | 92,228,498 | 16,016,326 | 21.0 | 1820 (Aug. 7) | 9,638,453 | 2,398,572 | 33.1 |
| 1900 (June 1) | 76,212,168 | 13,232,402 | 21.0 | 1810 (Aug. 6) | 7,239,981 | 1,931,308 | 36.4 |
| 1890 (June 1) | 63,979,766 | 12,790,557 | 25.5 | 1800 (Aug. 4) | 5,308,483 | 1,379,269 | 35.1 |
| 1880 (June 1) | 50,186,309 | 11,630,838 | 30.2 | 1790 (Aug. 2) | 3,929,214 | | |

* Excludes members of the Armed Forces overseas, estimated at \$600,000.

TABLE 2.—Population of the United States, by regions, divisions, and States, 1960 and 1950

[Minus sign (—) denotes decrease]

| Area | Population | | Increase, 1950 to 1960 | |
|--------------------------|-------------|-------------|------------------------|----------|
| | 1960 | 1950 | Number | Percent* |
| United States | 179,323,175 | 151,325,798 | 27,997,377 | 18.5 |
| Regions: | | | | |
| Northeast | 44,677,819 | 39,477,986 | 5,199,833 | 13.2 |
| North Central | 51,619,139 | 44,460,762 | 7,158,377 | 16.1 |
| South | 54,973,113 | 47,197,088 | 7,776,025 | 16.5 |
| West | 28,053,104 | 20,186,962 | 7,866,142 | 38.9 |
| Divisions: | | | | |
| New England | 10,509,367 | 9,314,453 | 1,194,914 | 12.8 |
| Middle Atlantic | 34,168,432 | 30,163,533 | 4,004,919 | 13.3 |
| East North Central | 36,225,024 | 30,369,368 | 5,855,656 | 19.2 |
| West North Central | 15,394,115 | 14,061,394 | 1,332,721 | 9.5 |
| South Atlantic | 28,971,732 | 21,182,335 | 7,789,397 | 22.6 |
| East South Central | 12,050,126 | 11,477,181 | 572,945 | 5.0 |
| West South Central | 16,951,255 | 14,537,572 | 2,413,683 | 16.6 |
| Mountain | 6,855,080 | 5,074,908 | 1,780,062 | 35.1 |
| Pacific | 21,198,044 | 15,114,964 | 6,083,080 | 40.2 |
| New England: | | | | |
| Maine | 960,265 | 913,774 | 46,491 | 6.1 |
| New Hampshire | 806,921 | 533,242 | 273,679 | 33.8 |
| Vermont | 399,881 | 377,747 | 22,134 | 3.2 |
| Massachusetts | 5,143,575 | 4,660,514 | 483,061 | 9.8 |
| Rhode Island | 839,498 | 791,896 | 47,602 | 8.5 |
| Connecticut | 2,535,234 | 2,007,280 | 527,954 | 26.3 |
| Middle Atlantic: | | | | |
| New York | 16,782,304 | 14,830,192 | 1,952,112 | 13.2 |
| New Jersey | 6,066,782 | 4,835,329 | 1,231,453 | 25.5 |
| Pennsylvania | 11,319,366 | 10,468,012 | 851,354 | 7.8 |
| East North Central: | | | | |
| Ohio | 9,700,397 | 7,946,627 | 1,753,770 | 22.1 |
| Indiana | 4,662,498 | 3,694,234 | 968,264 | 18.5 |
| Illinois | 10,081,158 | 8,712,176 | 1,368,982 | 15.7 |
| Michigan | 7,823,194 | 6,371,766 | 1,451,428 | 22.8 |
| Wisconsin | 4,951,777 | 3,434,575 | 1,517,202 | 15.1 |
| West North Central: | | | | |
| Minnesota | 3,413,864 | 2,982,483 | 431,381 | 14.5 |
| Iowa | 2,757,597 | 2,631,073 | 126,524 | 5.2 |
| Missouri | 4,819,813 | 3,954,653 | 865,160 | 9.2 |
| North Dakota | 632,446 | 619,636 | 12,810 | 2.1 |
| South Dakota | 680,514 | 652,740 | 27,774 | 4.3 |
| Nebraska | 1,411,330 | 1,325,510 | 85,820 | 6.5 |
| Kansas | 2,178,611 | 1,905,299 | 273,312 | 14.3 |

RELATING TO THE EIGHTEENTH DECENNIAL CENSUS

7

TABLE 2.—Population of the United States by regions, divisions, and States, 1960 and 1950—Continued

[Minus sign (—) denotes decrease]

| Area | Population | | Increase, 1950 to 1960 | |
|----------------------------|------------|------------|------------------------|---------|
| | 1960 | 1950 | Number | Percent |
| South Atlantic: | | | | |
| Delaware..... | 446,292 | 318,066 | 128,307 | 40.3 |
| Maryland..... | 3,100,689 | 2,343,001 | 757,688 | 32.3 |
| District of Columbia..... | 763,956 | 802,178 | -38,222 | -4.8 |
| Virginia..... | 3,966,949 | 3,318,080 | 648,869 | 19.5 |
| West Virginia..... | 1,860,421 | 2,005,552 | -145,131 | -7.2 |
| North Carolina..... | 4,556,155 | 4,061,929 | 494,226 | 12.2 |
| South Carolina..... | 2,362,504 | 2,117,027 | 245,567 | 12.5 |
| Georgia..... | 3,943,146 | 3,444,578 | 498,568 | 14.5 |
| Florida..... | 4,661,560 | 2,771,305 | 2,180,255 | 78.7 |
| East South Central: | | | | |
| Kentucky..... | 2,038,166 | 2,944,806 | 93,350 | 3.2 |
| Tennessee..... | 3,567,069 | 3,201,715 | 375,371 | 8.4 |
| Alabama..... | 3,296,740 | 3,061,743 | 204,997 | 6.7 |
| Mississippi..... | 2,178,141 | 2,178,914 | -773 | (1) |
| West South Central: | | | | |
| Arkansas..... | 1,786,272 | 1,909,511 | -123,239 | -6.5 |
| Louisiana..... | 3,257,022 | 2,663,516 | 573,506 | 21.4 |
| Oklahoma..... | 2,328,284 | 2,233,351 | 94,933 | 4.3 |
| Texas..... | 9,579,677 | 7,711,194 | 1,868,483 | 24.2 |
| Mountain: | | | | |
| Montana..... | 674,767 | 591,024 | 83,743 | 14.2 |
| Idaho..... | 697,191 | 588,687 | 78,554 | 13.3 |
| Wyoming..... | 330,066 | 290,529 | 39,537 | 13.6 |
| Colorado..... | 1,763,947 | 1,323,069 | 428,858 | 32.4 |
| New Mexico..... | 951,023 | 681,187 | 269,836 | 39.6 |
| Arizona..... | 1,302,161 | 749,587 | 552,574 | 73.7 |
| Utah..... | 890,627 | 606,862 | 201,765 | 29.9 |
| Nevada..... | 285,278 | 160,063 | 125,195 | 78.2 |
| Pacific: | | | | |
| Washington..... | 2,853,214 | 2,378,963 | 474,251 | 19.9 |
| Oregon..... | 1,768,667 | 1,521,341 | 247,346 | 16.3 |
| California..... | 15,717,304 | 10,586,223 | 5,130,981 | 48.5 |
| Alaska..... | 226,167 | 128,643 | 97,524 | 75.8 |
| Hawaii..... | 632,772 | 490,794 | 132,978 | 26.6 |

Less than 0.1 percent.

8 RELATING TO THE EIGHTEENTH DECENNIAL CENSUS

TABLE 3.—Current membership in the House of Representatives and apportionment of 435 Representatives in accordance with the results of the 1960 census

| Area | 1960 | Current | Gains | Losses |
|---------------------|------|---------|-------|--------|
| Total | 435 | 437 | | 2 |
| Regions: | | | | |
| Northeast | 108 | 115 | | 7 |
| North Central | 125 | 129 | | 4 |
| South | 133 | 134 | | 1 |
| West | 69 | 69 | 10 | |
| Divisions: | | | | |
| New England | 25 | 28 | | 3 |
| Middle Atlantic | 53 | 57 | | 4 |
| East North Central | 98 | 97 | 1 | |
| West North Central | 37 | 42 | | 5 |
| South Atlantic | 63 | 60 | 3 | |
| East South Central | 29 | 32 | | 3 |
| West South Central | 41 | 42 | 1 | 1 |
| Mountain | 17 | 16 | | 1 |
| Pacific | 32 | 43 | 9 | |
| New England: | | | | |
| Maine | 2 | 3 | | 1 |
| New Hampshire | 2 | 2 | | |
| Vermont | 1 | 1 | | |
| Massachusetts | 12 | 14 | | 2 |
| Rhode Island | 2 | 2 | | |
| Connecticut | 6 | 6 | | |
| Middle Atlantic: | | | | |
| New York | 41 | 43 | | 2 |
| New Jersey | 15 | 14 | 1 | |
| Pennsylvania | 27 | 30 | | 3 |
| East North Central: | | | | |
| Ohio | 24 | 22 | 1 | |
| Indiana | 11 | 11 | | |
| Illinois | 24 | 23 | | 1 |
| Michigan | 19 | 18 | 1 | |
| Wisconsin | 10 | 10 | | |
| West North Central: | | | | |
| Minnesota | 8 | 9 | | 1 |
| Iowa | 7 | 8 | | 1 |
| Missouri | 10 | 11 | | 1 |
| North Dakota | 2 | 2 | | |
| South Dakota | 2 | 2 | | |
| Nebraska | 3 | 4 | | 1 |
| Kansas | 3 | 6 | | 1 |
| South Atlantic: | | | | |
| Delaware | 1 | 1 | | |
| Maryland | 8 | 7 | 1 | |
| Virginia | 10 | 10 | | |
| West Virginia | 5 | 6 | | 1 |
| North Carolina | 11 | 12 | | 1 |
| South Carolina | 6 | 6 | | |
| Georgia | 10 | 10 | | |
| Florida | 12 | 8 | 4 | |
| East South Central: | | | | |
| Kentucky | 7 | 8 | | 1 |
| Tennessee | 9 | 9 | | |
| Alabama | 8 | 9 | | 1 |
| Mississippi | 5 | 6 | | 1 |
| West South Central: | | | | |
| Arkansas | 4 | 6 | | 2 |
| Louisiana | 8 | 8 | | |
| Oklahoma | 6 | 6 | | |
| Texas | 23 | 22 | 1 | |
| Mountain: | | | | |
| Montana | 2 | 2 | | |
| Idaho | 2 | 2 | | |
| Wyoming | 1 | 1 | | |
| Colorado | 4 | 4 | | |
| New Mexico | 2 | 2 | | |
| Arizona | 3 | 3 | 1 | |
| Utah | 2 | 2 | | |
| Nevada | 1 | 1 | | |
| Pacific: | | | | |
| Washington | 7 | 7 | | |
| Oregon | 4 | 4 | | |
| California | 38 | 30 | 8 | |
| Alaska | 1 | 1 | | |
| Hawaii | 2 | 1 | 1 | |

RELATING TO THE EIGHTEENTH DECENNIAL CENSUS

TABLE 4.—Rank of States according to population, 1980 and 1950

| 1980 | | | 1950 | | |
|------|----------------------|------------|------|----------------------|------------|
| Rank | State | Population | Rank | State | Population |
| 1 | New York | 16,782,304 | 1 | New York | 14,830,192 |
| 2 | California | 15,717,304 | 2 | California | 10,586,223 |
| 3 | Pennsylvania | 11,319,366 | 3 | Pennsylvania | 10,466,012 |
| 4 | Illinois | 10,061,156 | 4 | Illinois | 8,712,176 |
| 5 | Ohio | 9,706,397 | 5 | Ohio | 7,944,637 |
| 6 | Texas | 9,579,677 | 6 | Texas | 7,711,194 |
| 7 | Michigan | 7,822,194 | 7 | Michigan | 6,371,796 |
| 8 | New Jersey | 6,066,782 | 8 | New Jersey | 4,835,329 |
| 9 | Massachusetts | 5,148,578 | 9 | Massachusetts | 4,890,514 |
| 10 | Florida | 4,951,500 | 10 | North Carolina | 4,061,929 |
| 11 | Indiana | 4,662,408 | 11 | Missouri | 3,954,653 |
| 12 | North Carolina | 4,556,155 | 12 | Indiana | 3,934,224 |
| 13 | Missouri | 4,319,813 | 13 | Georgia | 3,444,578 |
| 14 | Virginia | 3,996,949 | 14 | Wisconsin | 3,434,575 |
| 15 | Wisconsin | 3,961,777 | 15 | Virginia | 3,318,680 |
| 16 | Georgia | 3,943,116 | 16 | Tennessee | 3,291,718 |
| 17 | Tennessee | 3,567,089 | 17 | Alabama | 3,051,743 |
| 18 | Minnesota | 3,413,864 | 18 | Minnesota | 2,982,483 |
| 19 | Alabama | 3,366,740 | 19 | Kentucky | 2,944,806 |
| 20 | Louisiana | 3,257,022 | 20 | Florida | 2,771,305 |
| 21 | Maryland | 3,100,689 | 21 | Louisiana | 2,663,516 |
| 22 | Kentucky | 3,038,156 | 22 | Iowa | 2,621,073 |
| 23 | Washington | 2,853,214 | 23 | Washington | 2,378,963 |
| 24 | Iowa | 2,757,537 | 24 | Maryland | 2,343,001 |
| 25 | Connecticut | 2,535,234 | 25 | Oklahoma | 2,233,351 |
| 26 | South Carolina | 2,362,594 | 26 | Mississippi | 2,178,914 |
| 27 | Oklahoma | 2,328,294 | 27 | South Carolina | 2,117,027 |
| 28 | Kansas | 2,178,611 | 28 | Connecticut | 2,007,280 |
| 29 | Mississippi | 2,178,141 | 29 | West Virginia | 2,005,552 |
| 30 | West Virginia | 1,860,421 | 30 | Arkansas | 1,909,511 |
| 31 | Arkansas | 1,786,272 | 31 | Kansas | 1,905,399 |
| 32 | Oregon | 1,768,687 | 32 | Oregon | 1,521,341 |
| 33 | Colorado | 1,753,947 | 33 | Nebraska | 1,325,510 |
| 34 | Nebraska | 1,411,330 | 34 | Colorado | 1,325,089 |
| 35 | Arizona | 1,302,161 | 35 | Maine | 913,774 |
| 36 | Maine | 969,265 | 36 | District of Columbia | 902,178 |
| 37 | New Mexico | 951,023 | 37 | Rhode Island | 791,696 |
| 38 | Utah | 890,627 | 38 | Arizona | 749,587 |
| 39 | Rhode Island | 859,488 | 39 | Utah | 688,862 |
| 40 | District of Columbia | 763,956 | 40 | New Mexico | 661,187 |
| 41 | South Dakota | 680,514 | 41 | South Dakota | 652,740 |
| 42 | Montana | 674,767 | 42 | North Dakota | 619,636 |
| 43 | Idaho | 667,191 | 43 | Montana | 591,024 |
| 44 | Hawaii | 632,772 | 44 | Idaho | 588,657 |
| 45 | North Dakota | 632,446 | 45 | New Hampshire | 533,242 |
| 46 | New Hampshire | 606,921 | 46 | Hawaii | 499,794 |
| 47 | Delaware | 446,292 | 47 | Vermont | 377,747 |
| 48 | Vermont | 369,881 | 48 | Delaware | 318,085 |
| 49 | Wyoming | 330,066 | 49 | Wyoming | 290,529 |
| 50 | Nevada | 285,278 | 50 | Nevada | 160,083 |
| 51 | Alaska | 226,167 | 51 | Alaska | 128,643 |

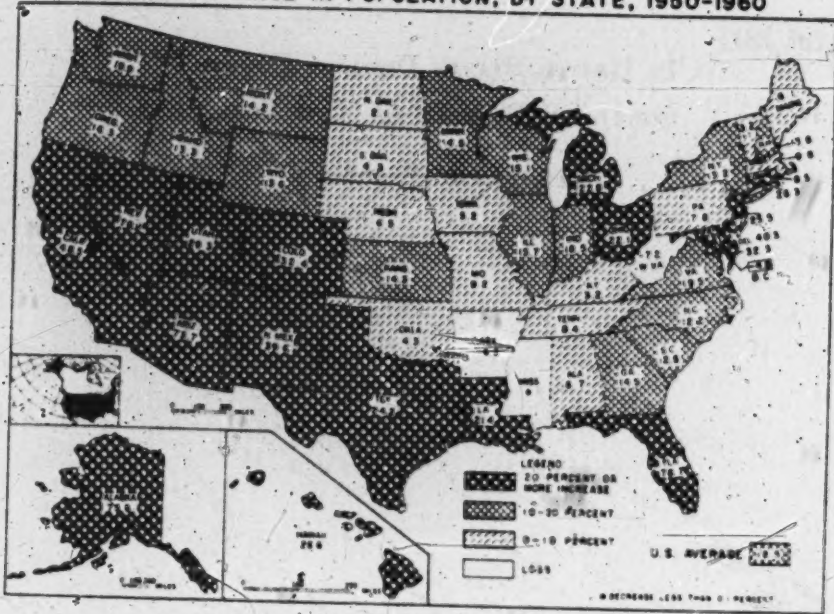
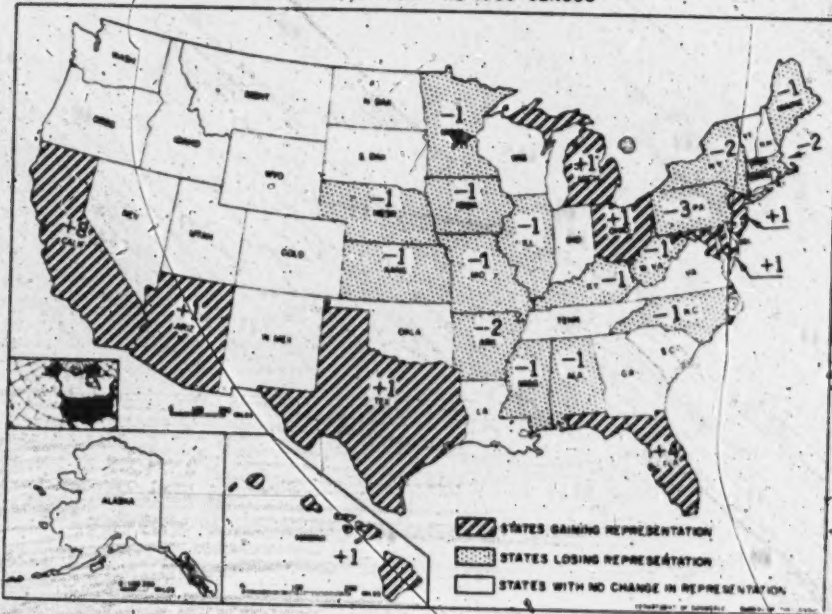
TABLE 5.—*Rank of States according to amount and percent of change in population between 1960 and 1980*

(Minus sign (—) denotes decrease)

| Rank according to amount of change | State | Population change, 1960 to 1980 | Rank according to percent of change | State | Percent of change in population, 1960 to 1980 |
|------------------------------------|----------------------|---------------------------------|-------------------------------------|----------------------|---|
| 1 | California | 4,130,081 | 1 | Florida | 78.7 |
| 2 | Florida | 2,180,287 | 2 | Nevada | 78.2 |
| 3 | New York | 1,982,112 | 3 | Alaska | 75.8 |
| 4 | Texas | 1,888,483 | 4 | Arizona | 73.7 |
| 5 | Ohio | 1,750,770 | 5 | California | 48.5 |
| 6 | Michigan | 1,451,428 | 6 | Delaware | 40.3 |
| 7 | Illinois | 1,388,983 | 7 | New Mexico | 39.6 |
| 8 | New Jersey | 1,281,453 | 8 | Colorado | 32.4 |
| 9 | Pennsylvania | 821,354 | 9 | Maryland | 32.3 |
| 10 | Maryland | 787,688 | 10 | Utah | 29.3 |
| 11 | Indiana | 728,274 | 11 | Hawaii | 28.6 |
| 12 | Virginia | 648,280 | 12 | Connecticut | 28.3 |
| 13 | Louisiana | 578,806 | 13 | New Jersey | 35.5 |
| 14 | Arizona | 572,574 | 14 | Texas | 34.2 |
| 15 | Connecticut | 517,994 | 15 | Michigan | 22.8 |
| 16 | Wisconsin | 517,202 | 16 | Ohio | 22.1 |
| 17 | Georgia | 498,838 | 17 | Louisiana | 21.4 |
| 18 | North Carolina | 494,226 | 18 | Washington | 19.9 |
| 19 | Washington | 474,251 | 19 | Virginia | 19.5 |
| 20 | Massachusetts | 458,064 | 20 | Indiana | 18.5 |
| 21 | Minnesota | 431,381 | 21 | Oregon | 16.3 |
| 22 | Colorado | 428,856 | 22 | Illinois | 15.7 |
| 23 | Missouri | 365,100 | 23 | Wisconsin | 15.1 |
| 24 | Tennessee | 275,371 | 24 | Georgia | 14.5 |
| 25 | Kansas | 273,312 | 25 | Minnesota | 14.5 |
| 26 | New Mexico | 269,836 | 26 | Kansas | 14.3 |
| 27 | South Carolina | 265,567 | 27 | Montana | 14.2 |
| 28 | Oregon | 247,348 | 28 | New Hampshire | 13.8 |
| 29 | Alabama | 204,967 | 29 | Wyoming | 13.6 |
| 30 | Utah | 201,785 | 30 | Idaho | 13.3 |
| 31 | Iowa | 185,464 | 31 | New York | 13.2 |
| 32 | Hawaii | 132,978 | 32 | South Carolina | 12.5 |
| 33 | Delaware | 128,207 | 33 | North Carolina | 12.2 |
| 34 | Nevada | 125,195 | 34 | Massachusetts | 9.8 |
| 35 | Alaska | 97,524 | 35 | Missouri | 9.2 |
| 36 | Oklahoma | 94,933 | 36 | Rhode Island | 8.5 |
| 37 | Kentucky | 83,330 | 37 | Tennessee | 8.4 |
| 38 | Nebraska | 85,820 | 38 | Pennsylvania | 7.8 |
| 39 | Montana | 83,743 | 39 | Alabama | 6.7 |
| 40 | Idaho | 78,554 | 40 | Nebraska | 6.5 |
| 41 | New Hampshire | 73,679 | 41 | Maine | 6.1 |
| 42 | Rhode Island | 67,592 | 42 | Iowa | 5.2 |
| 43 | Maine | 55,491 | 43 | South Dakota | 4.5 |
| 44 | Wyoming | 36,537 | 44 | Oklahoma | 4.3 |
| 45 | South Dakota | 27,774 | 45 | Vermont | 3.2 |
| 46 | North Dakota | 12,810 | 46 | Kentucky | 3.2 |
| 47 | Vermont | 12,134 | 47 | North Dakota | 2.1 |
| 48 | Mississippi | — 773 | 48 | Mississippi | (1) |
| 49 | District of Columbia | — 38,223 | 49 | District of Columbia | — 4.8 |
| 50 | Arkansas | — 123,239 | 50 | Arkansas | — 6.5 |
| 51 | West Virginia | — 145,131 | 51 | West Virginia | — 7.2 |


1 Less than 0.1 percent.

PERCENT CHANGE IN POPULATION, BY STATE, 1950-1960

POTENTIAL CHANGES IN CONGRESSIONAL REPRESENTATION
RESULTING FROM THE 1960 CENSUS

[fol. 384]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
DEFENDANTS' EXHIBIT C

(See opposite) 

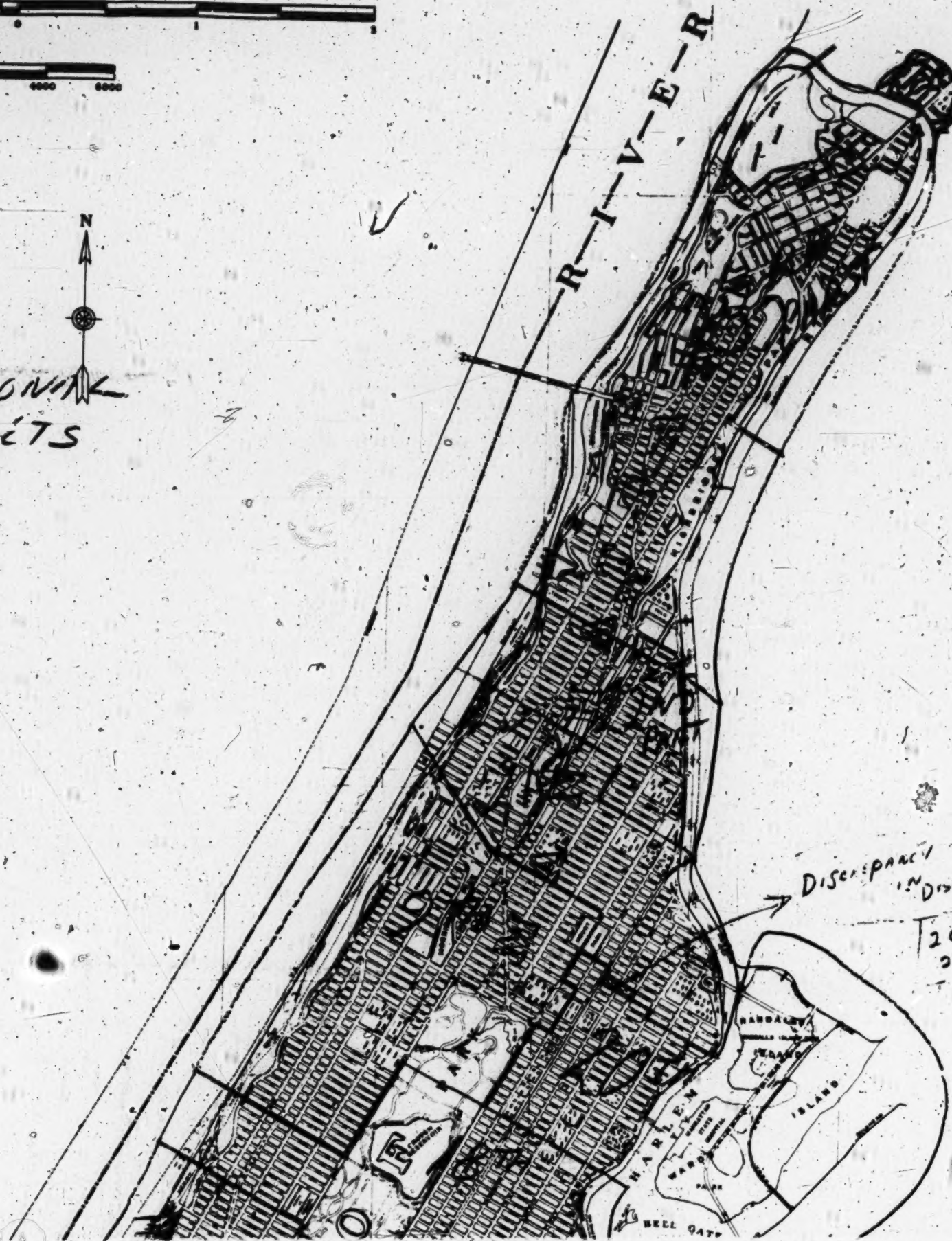
**BOROUGH OF MANHATTAN
DEPARTMENT OF CITY PLANNING
THE CITY OF NEW YORK
AUGUST 1956**

IN UNITED STATES DISTRICT COURT, *Southern District, New York*
✓ Defendants' Exhibit C



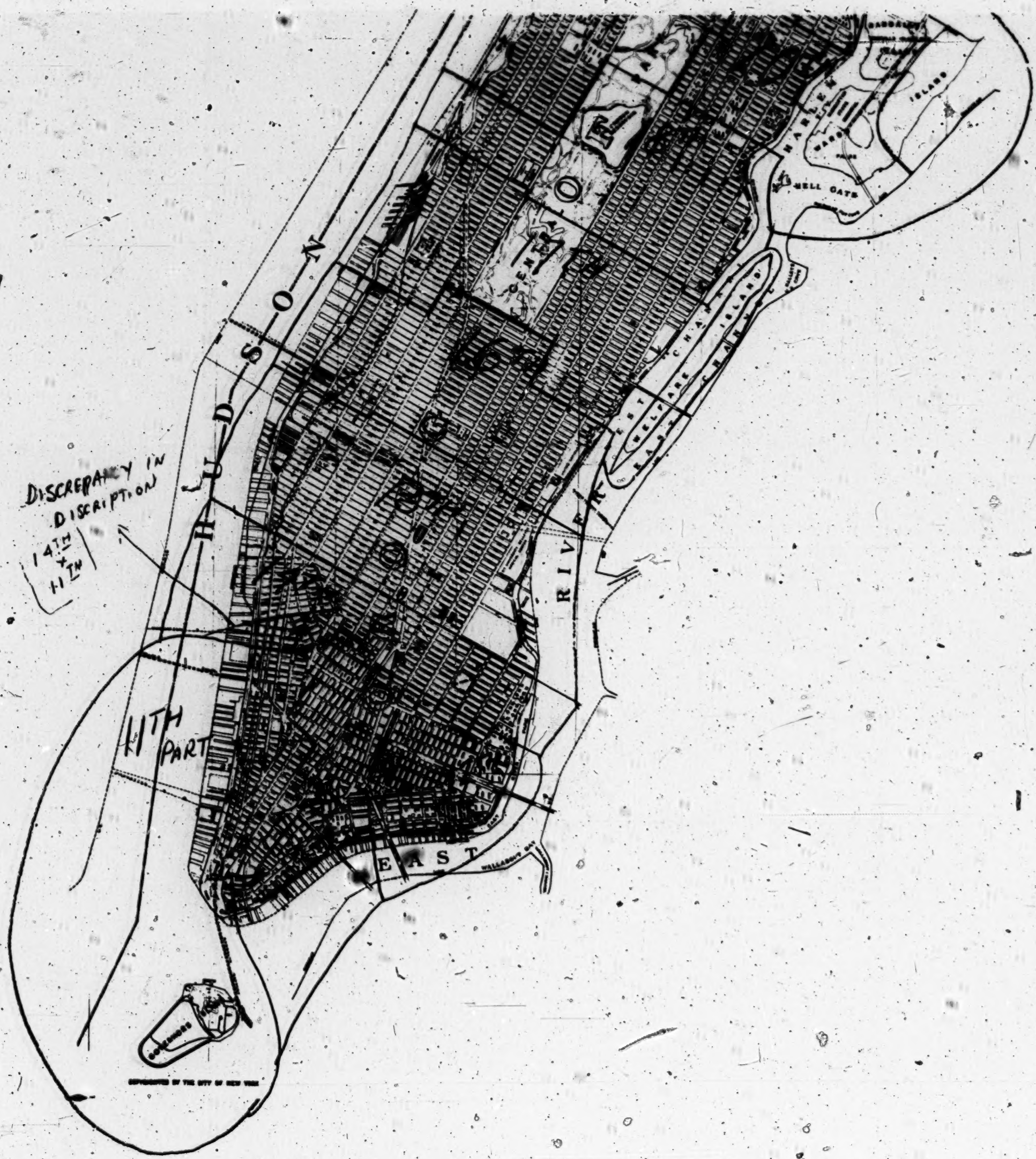
1911

CONGRESSIONAL DISTRICTS



DISCREPANCY IN DISCRIMINATION

T 20 ⁷¹⁴
21 ⁵⁷



DISCREPANCY IN
DESCRIPTION
14TH
+
11TH

11TH
PART

EAST




DEPARTMENT OF THE CITY OF NEW YORK

[fol. 385]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

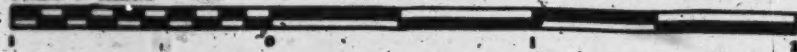
DEFENDANTS' EXHIBIT D

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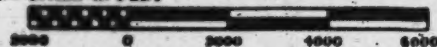
BOROUGH OF MANHATTAN
DEPARTMENT OF CITY PLANNING
THE CITY OF NEW YORK

AUGUST 1936

SCALE IN MILES



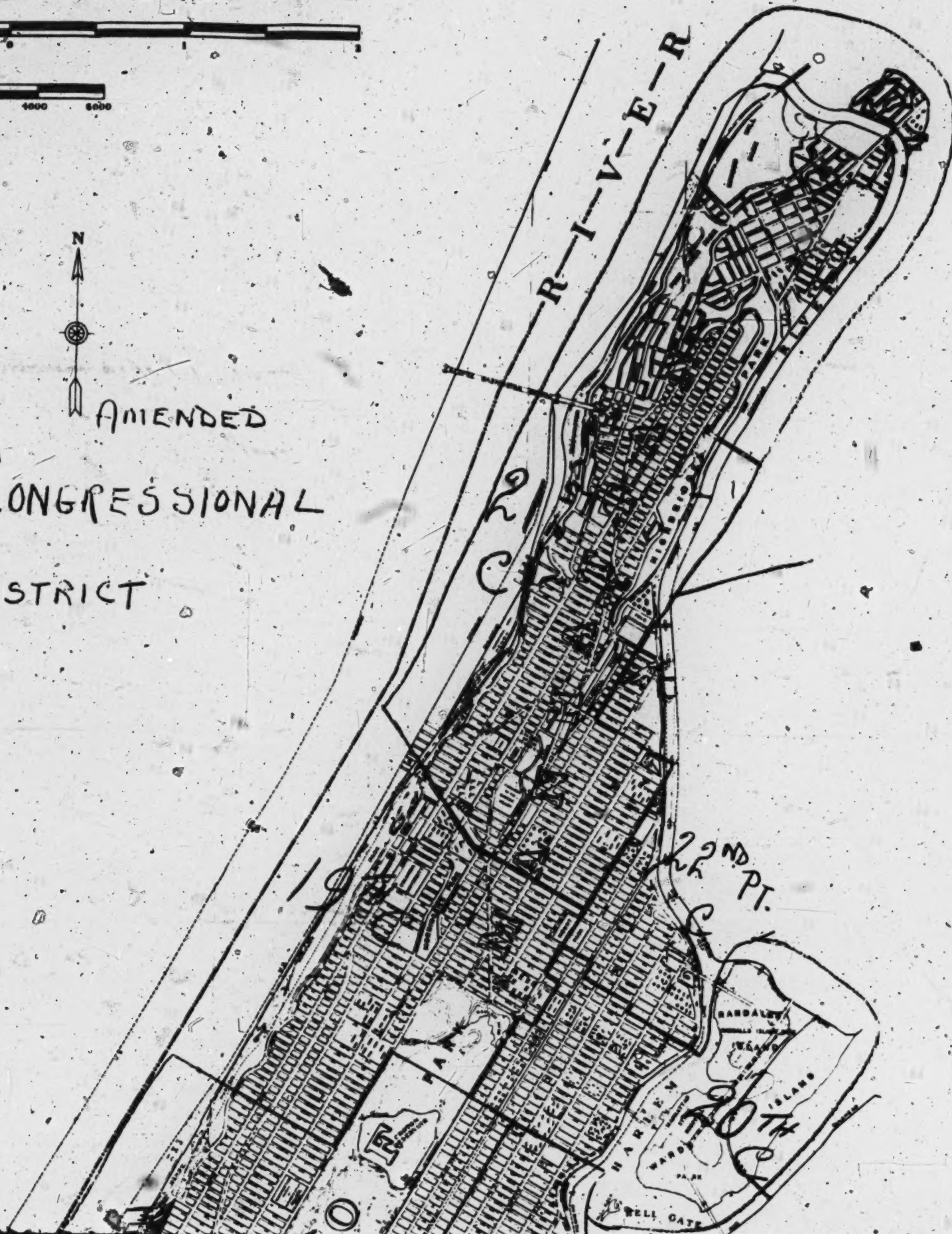
SCALE IN FEET



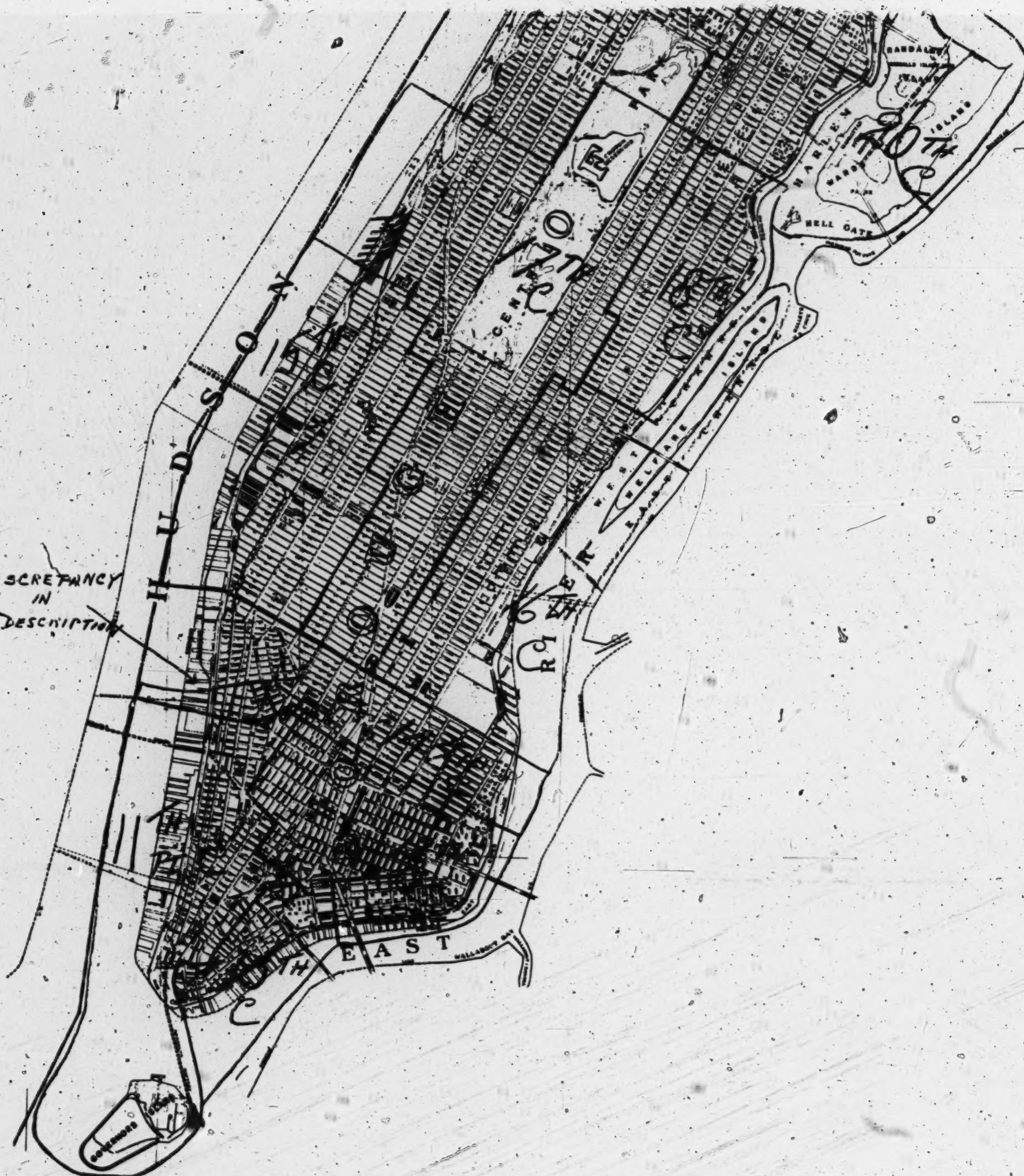
AMENDED

1917 CONGRESSIONAL
DISTRICT

IN UNITED STATES DISTRICT COURT *Southern District of New York*
Defendants' Exhibit 2



DISCREPANCY
IN
DESCRIPTION




ADVERTISED BY THE CITY OF NEW YORK

236

[fol. 386]

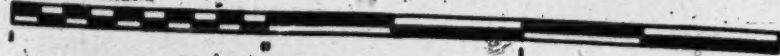
IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT E

(See opposite) 

AUGUST 1956

SCALE IN MILES

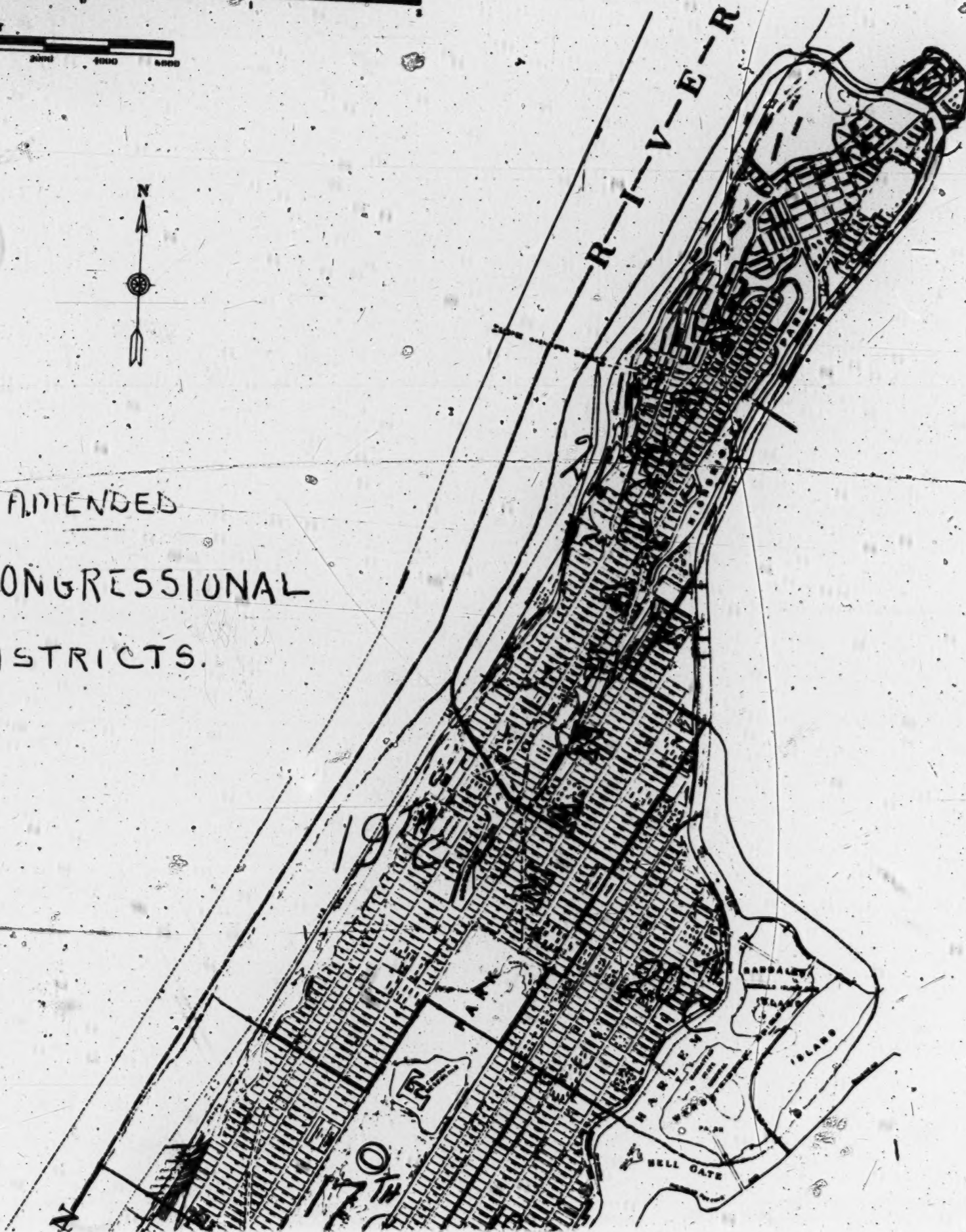


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1922 CONGRESSIONAL
DISTRICTS.

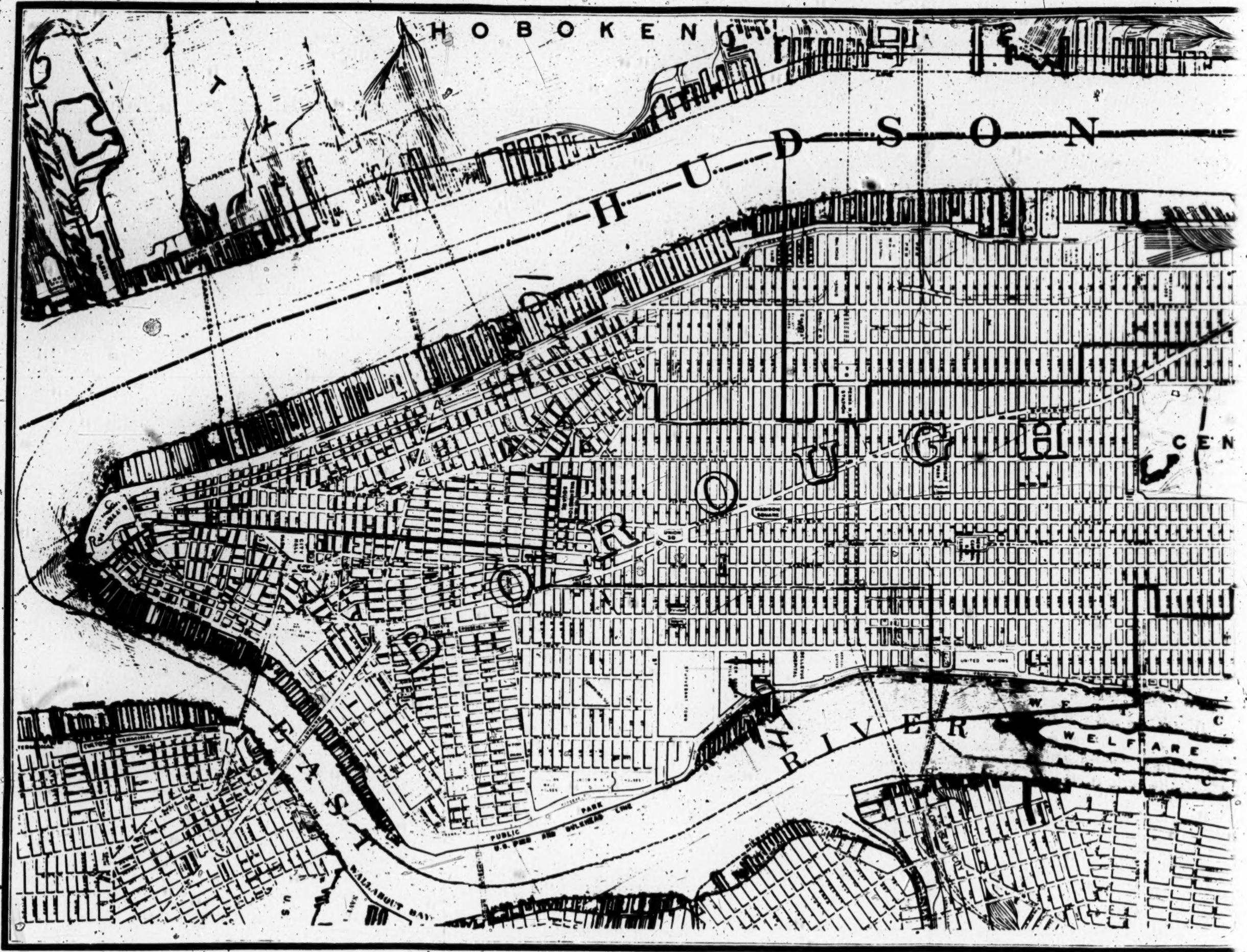


[fol. 387]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS' EXHIBIT F

(See opposite) 





OFFICE OF THE PRESIDENT
BOROUGH OF MANHATTAN



CORRECTED TO APRIL 1950
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1941 CONGRESSIONAL DISTRICTS

240

[fol. 388]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

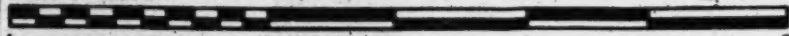
DEFENDANTS' EXHIBIT G

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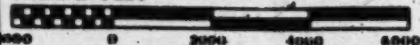
Defendant

BOROUGH OF MANHATTAN
DEPARTMENT OF CITY PLANNING
THE CITY OF NEW YORK
AUGUST 1956

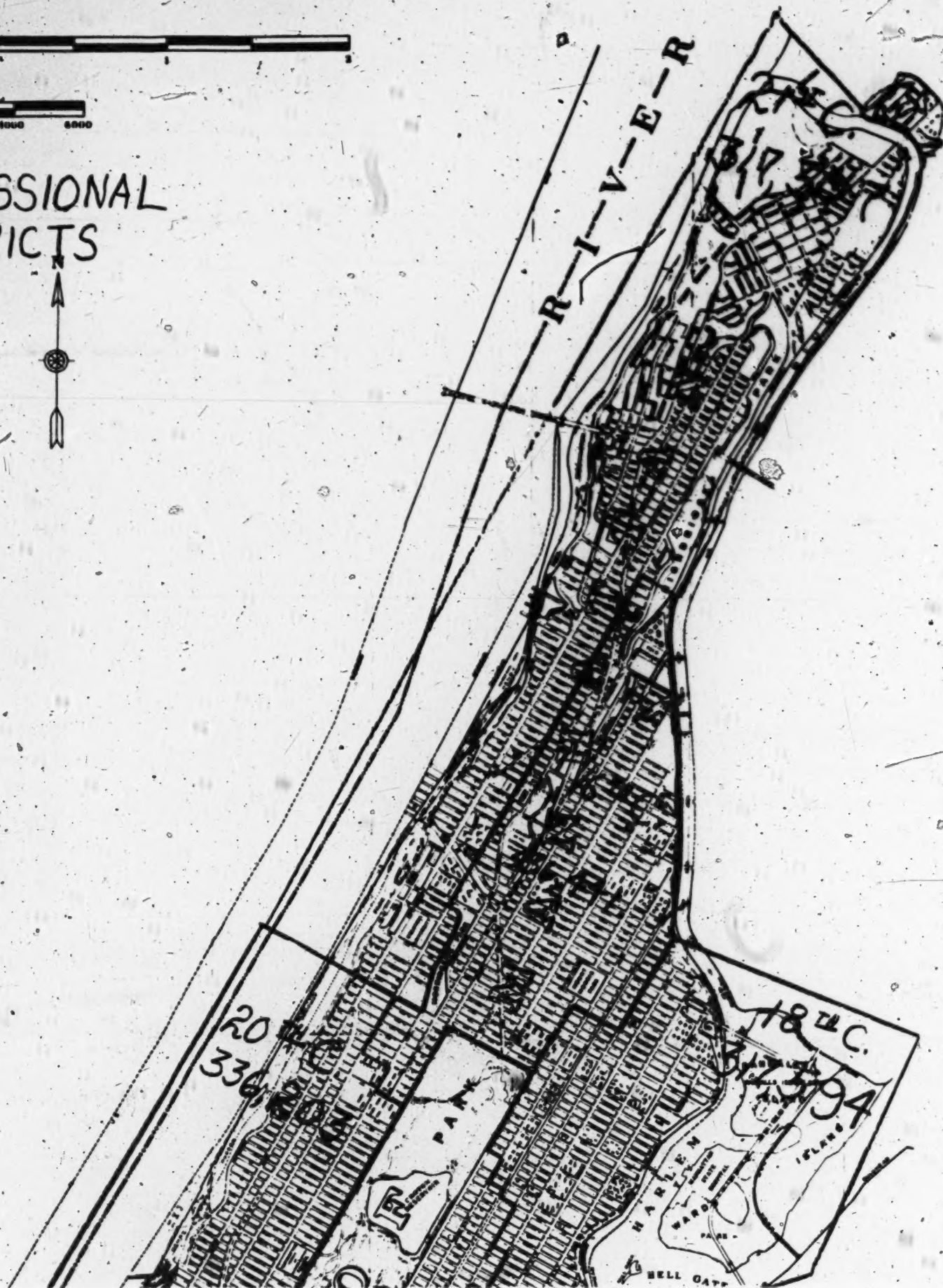
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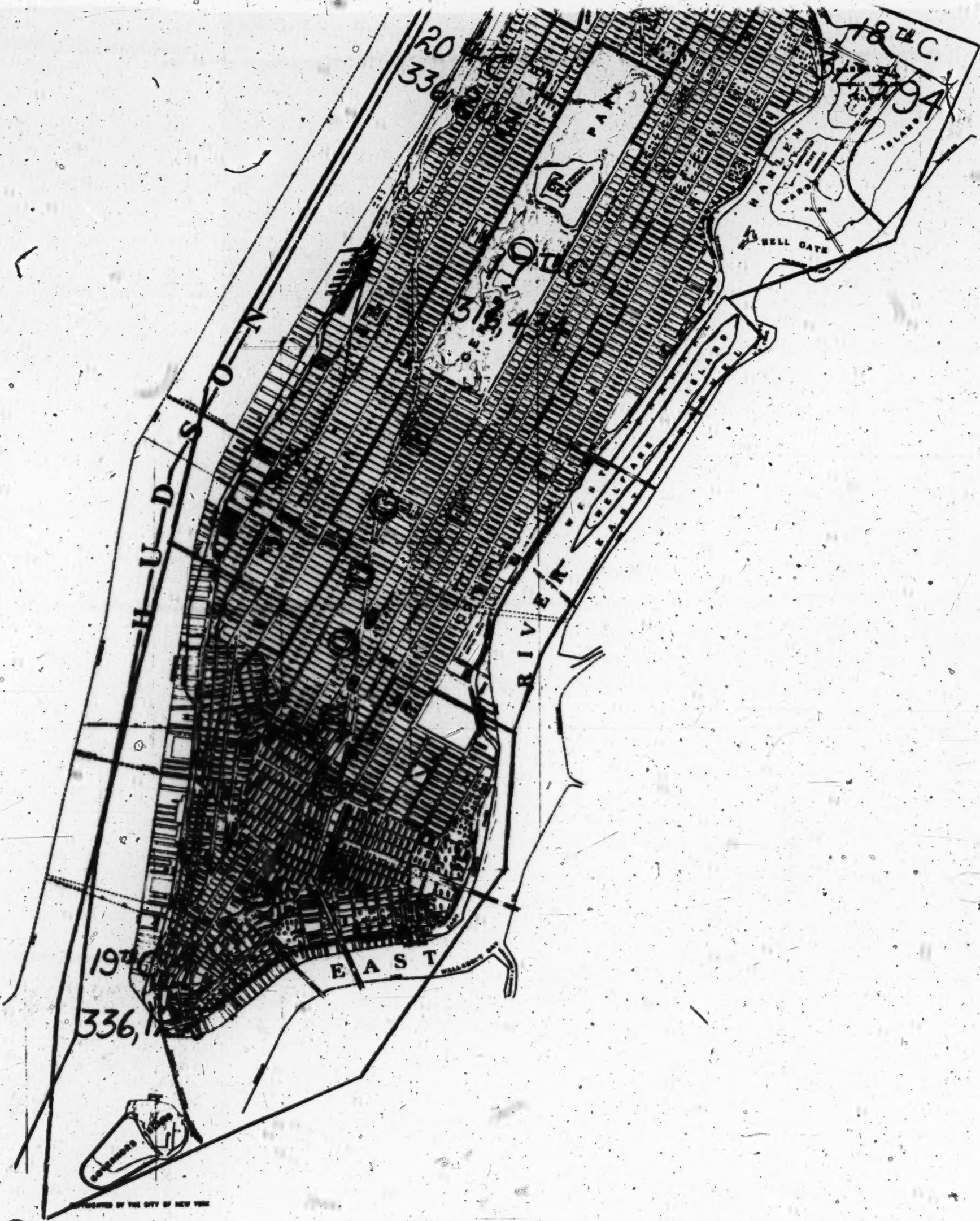


SCALE IN FEET



CONGRESSIONAL
DISTRICTS





242

[fol. 389]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
DEFENDANTS' EXHIBIT H

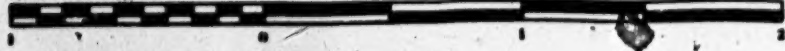
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BOROUGH OF MANHATTAN
DEPARTMENT OF CITY PLANNING
THE CITY OF NEW YORK
AUGUST 1956

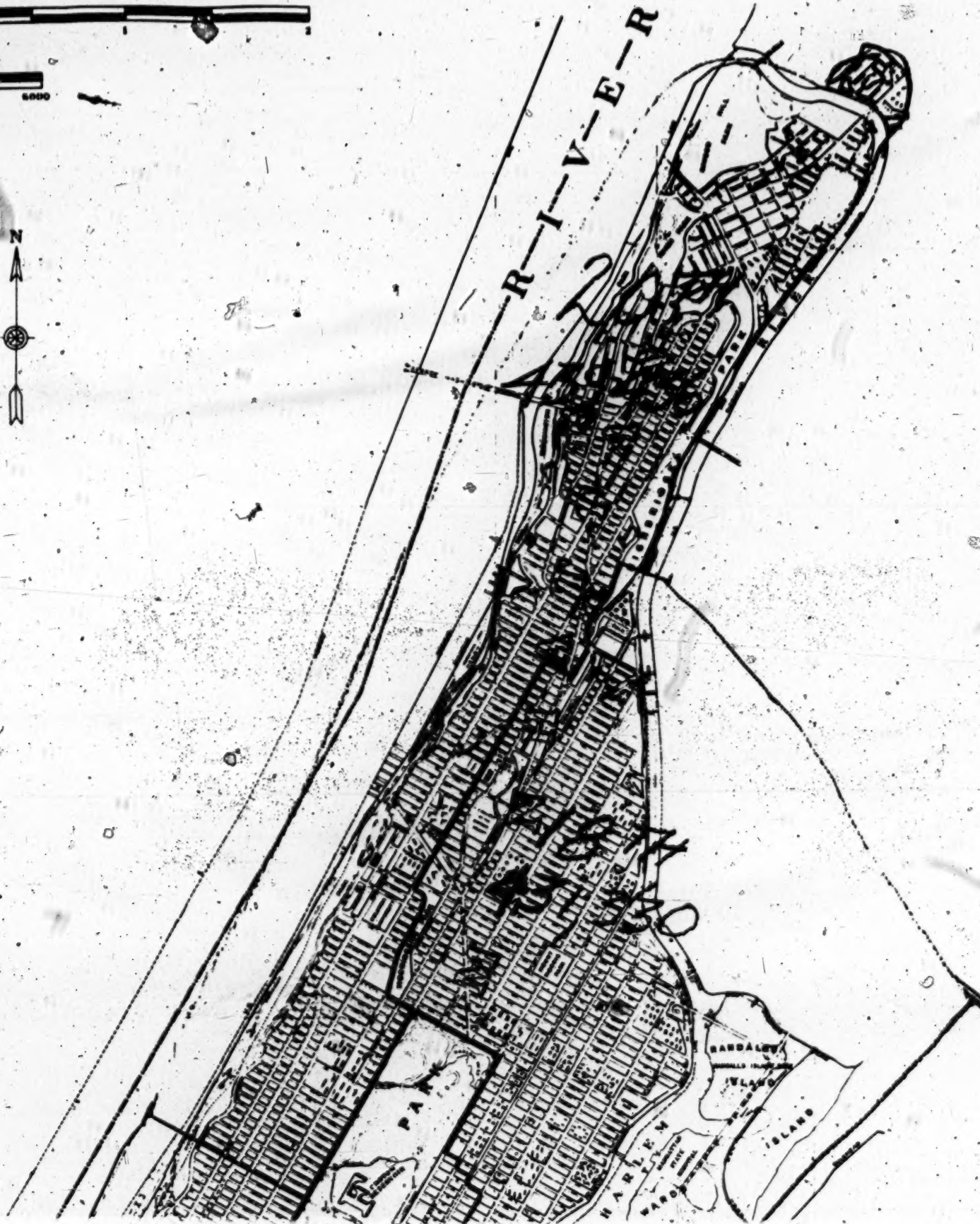
IN UNITED STATES DISTRICT COURT

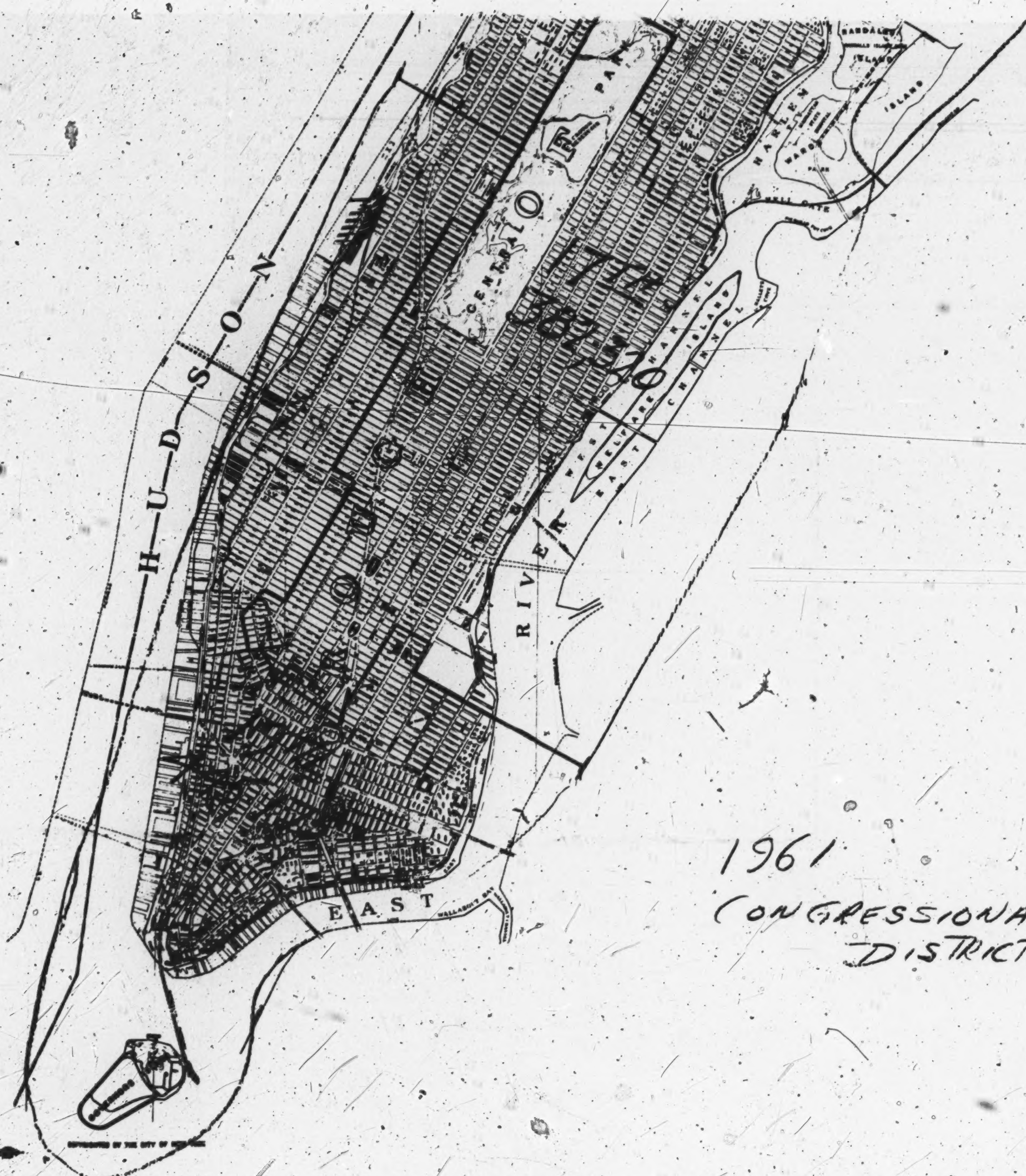
*Section 87(2)(b) of New York
Judiciary Law*
Exhibit A

SCALE IN MILES



SCALE IN FEET





1961
CONGRESSIONAL
DISTRICTS

[fol. 390] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 392]

SUPREME COURT OF THE UNITED STATES

No. 950, October Term, 1962

YVETTE M. WRIGHT, et al., Appellants,

vs.

NELSON A. ROCKEFELLER, Governor of New York, et al.

Appeal from the United States District Court for the
Southern District of New York.

ORDER NOTING PROBABLE JURISDICTION—June 10, 1963

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdiction
is noted.

MAR 25 1963

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES,
DARWIN BOLDEN, BENNY CARTAGENA,
RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA
SELBY, WALSH McDERMOTT, SETH DUBIN,
all individually and on behalf of all other persons
similarly situated,

Plaintiffs-Appellants,

—against—

NELSON A. ROCKEFELLER, Governor of the State
of New York, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York, CAROLINE K.
SIMON, Secretary of State of the State of New York,
and DENIS J. MAHON, JAMES M. POWER, JOHN
R. CREWS and THOMAS MALLEE, Commissioners
of Elections constituting the Board of Elections of the
City of New York,

Defendants-Appellees,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES,
LLOYD E. DICKENS, HULAN E. JACK, MARK
SOUTHALL and ANTONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

JUSTIN N. FELDMAN
415 Madison Avenue
New York 17, N. Y.

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New York 16, N. Y.

Attorneys for Appellants.

GEORGE M. COHEN
ELSIE M. QUINLAN
Of counsel

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN
BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R.
ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH
DUBIN, all individually and on behalf of all other persons
similarly situated, *Plaintiffs-Appellants;*

—against—

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, CAROLINE K. SIMON, Secretary of
State of the State of New York, and DENIS J. MAHON,
JAMES M. POWER, JOHN R. CREWS and THOMAS MAL-
LEE, Commissioners of Election constituting the Board
of Elections of the City of New York,

Defendants-Appellees,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and AN-
TONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinion Below

The three separate opinions of the three-judge District
Court (Appendix A, *infra*) are reported at 211 F. Supp.

Jurisdiction

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. On November 26, 1962 the Court entered a judgment dismissing the complaint. A Notice of Appeal was filed in the District Court on January 23, 1963 (R. 531-33). Jurisdiction of this Court to review the judgment-below is conferred by 28 U. S. C. § 1253.

Questions Presented

1. Whether appellants sustained their burden of proving that the portion of Chapter 980 of the 1961 Laws of the State of New York which delineates the boundaries of the Congressional districts in Manhattan Island segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment.

2. Whether a statute which segregates persons by race or place of origin may be declared constitutional on the ground (a) that no proof of specific harm to the individuals subject to the statute has been adduced at trial or (b) that the segregation is benign in its effect.

3. Whether plaintiffs attacking the constitutionality of a state statute must, in addition to proving that the statute has the demonstrable effect of segregating persons by race or place of origin, also prove that the "motive" of the legislature was to produce that effect.

4. Assuming, *arguendo*, that both effect and motive must be shown (a) whether plaintiffs' burden of proof is greater than that required in the usual civil case, and (b) whether a court may sustain the constitutionality of the

statute by inferring an alternative legislative motive regarding which there is no evidence in the record and which is not a proper subject of judicial notice.

Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are the Fourteenth and Fifteenth amendments to the United States Constitution, 2 U. S. C. § 2(a), 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. §§ 1343, 2201, 2202 and 2281, and Chapter 980 of the 1961 Laws of New York. The pertinent provisions of 2 U. S. C. § 2(a) and Chapter 980 are set forth in Appendix B, *infra*.

Statement

On November 9, 1961, the Joint Legislative Committee on Reapportionment recommended to an extraordinary session of the New York State Legislature a statute redrawing the boundaries of the Congressional districts of the state in accordance with the 1960 Federal census, as required by 2 U. S. C. § 2(a), *New York State Legislative Document No. 45 (1961)*, set forth in Appendix B, *infra*. No hearings were held and no debates recorded, and the statute was passed without change and signed by the Governor on the next day. N. Y. Sess. Laws, Extraordinary Sess. 1961, c. 980 §§ 110-12.

On July 26, 1962, appellants filed a civil complaint pursuant to the Civil Rights Act, 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. § 1343, in which they challenged that portion of the statute which delineates the boundaries of the four Congressional districts which are wholly contained in, and comprise all of the districts in, New York County (the island or borough of Manhattan). Appellants are residents and registered voters in each of these four districts. The appellees named in the complaint are various state and city

officials charged with the administration of the statute. The complaint alleges that the challenged portion of the statute segregates eligible voters in Manhattan on the basis of race and place of origin in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment. The complaint seeks a judgment pursuant to 28 U. S. C. § 2201 declaring the challenged portion of the statute unconstitutional and restraining the defendants in the enforcement thereof and, in the event such declaration does not lead to corrective legislation, additional equitable relief.

On July 31, 1962, on motion of appellants and after hearing, Feinberg, *D.J.* determined that a three-judge court should be convened pursuant to 28 U. S. C. §§ 2281 and 2284.

At the opening of the trial before the three-judge court, Adam Clayton Powell, the then incumbent Congressman from the pre-1961 18th Congressional District, and five other individuals, alleging *inter alia* that "Negroes and Puerto Ricans now control" one of the four districts in Manhattan, which might be affected by a judgment in the case, were permitted to intervene as defendants.

During the trial, appellants presented evidence in the form of charts, statistics and expert testimony, showing the boundaries of the four districts in Manhattan and the white and non-white and Puerto Rican* population** within

*The non-white and Puerto Rican classification derives from the U. S. Census breakdown (R. 52-54) and the classification used by New York City agencies. See N. Y. C. Board of Education, *Toward Greater Opportunity*, 155 (1960). Puerto Ricans in New York City are "an easily identifiable group [requiring] the aid of a Court in securing equal treatment under law . . ." *Hernandez v. Texas*, 347 U. S. 475, 478 (1954).

**Total population rather than eligible voters, residents, or other classification, was selected because the Constitution and Congress require Congressional districting on the basis of total population. U. S. Constitution Art. I, § 3; Fourteenth Amendment § 2; 2 U. S. C. § 2(a).

those boundaries. Certain of appellants' trial exhibits are set forth in Appendix C.*

Appellants' evidence showed that the number of Congressional districts in Manhattan was reduced by the 1961 statute from 6 to 4, thus requiring a redrawing of boundaries and an increase in the population of the remaining four districts. Appellants' uncontroverted evidence also showed as follows:

- The total population of Manhattan Island is 37.7% non-white and Puerto Rican (Pltfs.' Exh. 3).
- The first of the four districts drawn by the statute (the 17th) contains a population which is 94.9% white non-Puerto Rican, was carved out of the center of the Island, has an irregular 35-sided configuration and is the least populous of the four districts (Pltfs.' Exhs. 2B and 3).
- The next district drawn by the statute (the adjacent 18th) contains a population which is 86.6% non-white and Puerto Rican and is the second-least populous district (Pltfs.' Exh. 3).
- The boundary between the 17th and 18th is a 13-sided step-shaped configuration which fences a maximum number of non-whites and Puerto Ricans out of the 17th and into the 18th (R. 99-108).**

*It should be noted that Pltfs.' Exh. 4 does not precisely reflect the racial distribution around the borders of the 17th District. The shadings in the Exhibit cover entire census tracts, whereas the boundaries of the 17th cut through 16 such tracts. As shown by the testimony, most of the non-whites and Puerto Ricans in the cut tracts are excluded from the 17th (R. 95-121).

**One exception is an area retained in the 18th containing 10,507 persons, of whom less than 4.9% are non-white and Puerto Rican. However, a public housing project, authorized in May of 1959, is now being constructed in this area (Pltfs.' Exh. 7). Such projects in New York City have an average non-white and Puerto Rican occupancy of 73.4% (Pltfs.' Exh. 7).

- The remaining two districts, which fill out the rest of the Island, are approximately equal in total population and racial composition, each containing just over 70% white non-Puerto Ricans and just under 30% non-whites and Puerto Ricans (Pltfs.' Exh. 3).
- The boundaries of these remaining two districts are drawn so as to maximize the predominantly white non-Puerto Rican character of the 17th and the non-white and Puerto Rican character of the 18th (R. 108-119 and Pltfs.' Exhs. 4, 4A and 4B).
- The 17th could not be expanded in any direction so as to make it reasonably equal in population to the other districts, nor could its boundary lines be significantly straightened, without incorporating heavy concentrations of non-whites and Puerto Ricans (R. 99-119 and Pltfs.' Exhs. 4, 4A and 4B).
- All but 3.1% of the Island's non-whites and Puerto Ricans are included in districts in which their votes are 12-15% less valuable than those of the residents of the 17th (Pltfs.' Exh. 3).
- As a result of the three redistricting acts since 1911, the 17th has been altered from a rectangular configuration to its present 35-sided irregular shape (Defts.' Exhs. C-H, R. 595-600).
- The two geographical areas added to the 17th by the 1961 statute were the two remaining areas in Manhattan with the highest concentrations of white non-Puerto Rican population, an average of approximately 98% (R. 123-25 and Pltfs.' Exh. 4B).
- In adding one all white non-Puerto Rican housing project (Stuyvesant Town) to the 17th, an adjacent area containing a non-white Puerto Rican population

of 12.2% was omitted, thus leaving an inexplicable loop in the boundary of the 17th and increasing its irregular configuration* (R. 143-44 and Pltfs.' Exh. 4B).

- The one area dropped from the 17th by the 1961 statute was the area of highest concentration of non-whites and Puerto Ricans (44.5%) remaining in the district at the time of the adoption of the statute (R. 139-40).
- The new 17th created by the 1961 statute contains almost 50% more persons than the old 17th, but the percentage of non-whites and Puerto Ricans in the district was reduced from 6.6% to only 5.1% (R. 123, 179-80).
- None of three hypothetical divisions of the Island into four districts on a logical basis, using natural boundaries or well known streets and avenues, produce concentrations of whites on the one hand and Negroes and Puerto Ricans on the other which even approach the concentrations achieved by the statute (Pltfs.' Exh. 6 and R. 142-48).

At the close of appellants' case, no evidence was offered either by the appellee state officials or by the intervening appellees. The appellee state officials alleged no affirmative defenses. The intervening appellees failed to introduce evidence in support of the affirmative defenses alleged in their pleading, and, because there was no evidence in the record to support them, the court below refused to consider

*Stuyvesant Town is 99.5% white non-Puerto Rican (R. 124-25 and Pltfs.' Exh. 4B) under sanction of the decision in *Dorsey v. Stuyvesant Town*, 299 N. Y. 512 (1949).

or to pass upon these alleged defenses. (Appendix A, *infra*, pp. 22a-23a).

In dismissing the complaint, the three-judge court divided two to one, and each of the judges filed a separate opinion.

Judge Moore took the position that racially segregated voting districts are constitutional, at least absent a showing of serious underrepresentation or other specific harm to the individuals concerned. He stated that plaintiffs "must show more than a mere preference to be in some other district and associated for voting purposes with persons of other races or other countries of origin" (*Id.* pp. 10a-11a) and noted that "plaintiffs have not even shown that their voting status will be changed in any way" (*Id.* at p. 15a).

Judge Moore also took the position that segregated voting districts could be constitutionally justified, or even constitutionally required, because they may enable persons of the same race or place of origin "to obtain representation in legislative bodies which otherwise would be denied to them" (*Id.* at p. 17a).

Even if segregated voting districts could violate the Constitution, Judge Moore was of the opinion that they could be unconstitutional only if the legislature's "motive" was to create such districts; that plaintiffs must introduce proof of this "motive"; and that, in this case, no such proof was tendered by the plaintiffs (*Id.* at pp. 4a, 10a, 11a, 14a, 15a).

Judge Feinberg disagreed with Judge Moore's view that segregated voting districts are constitutional absent a showing of specific harm, stating that the "constitutional vice [is] the use by the legislature of an impermissible standard and the harm to plaintiffs that need be shown is only that such a standard was used" (*Id.* at p. 18a). Judge Feinberg also disagreed with the view that segregated districts

could be constitutionally justified by alleged advantages to persons of a particular race or place of origin. In Judge Feinberg's opinion, the Constitution is "color-blind," and "good" segregation is as repugnant as "bad" segregation (*Id.* at p. 20a).

However, Judge Feinberg agreed that plaintiffs must show a legislative "motive" or "intent" to segregate as a prerequisite to a finding of unconstitutionality (*Id.* at pp. 20a, 23a). Moreover, Judge Feinberg believed that plaintiffs have a "difficult burden" to meet in attacking the constitutionality of a state statute (*Id.* at p. 20a), and that plaintiffs had not sustained their "difficult burden" of proving an unconstitutional legislative motive in this case. Although plaintiffs' evidence, in his view, "might justify" a finding of a legislative motive to segregate, he rejected such a finding on the ground that "other inferences . . . are equally or more justifiable" (*Id.*). The only such inference specifically cited by Judge Feinberg was that the legislature intended to classify persons by "social and economic background," (*Id.* at p. 24a), an inference regarding which there was no evidence whatever.

In his dissent, Judge Murphy agreed with Judge Feinberg as to the applicable constitutional standards. But on his view of the record, the plaintiffs carried their burden of proving that "the legislation was solely concerned with segregating white and colored and Puerto Rican voters by leaving colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (*Id.* at p. 28a); that the legislation had effected "obvious segregation"; and that the statute constituted a "subtle exclusion" of Negroes from the 17th and a "jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors" (*Id.* at 32a). Accordingly, Judge Murphy thought plaintiffs had met their burden of proving segregation within *Hernandez v. Texas*, 347 U. S.

475, 479-81 (1954), and, in the absence of any proof by defendants or intervenors, were entitled to a judgment declaring the statute unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Questions Presented Are Substantial

The judgment and opinions below reflect an impermissible reading of the record in this case as well as the application of novel and improper Constitutional standards. If allowed to stand, unreviewed by any appellate court, they will not only continue the segregated pattern of political life in Manhattan and leave legislatures everywhere virtually free from Constitutional restraint in the creation of segregated voting districts, but they will also establish undesirable precedents and create confusion in segregation cases generally. Specifically, the judgment and opinions below (a) would permit unbridled segregation unless specific harm to the individuals involved could be shown, (b) would sustain segregation deemed to have a benign effect or to be prompted by an alternative legislative "motive", (c) would impose a virtually unachievable standard of proof upon plaintiffs in segregation cases, and (d) would permit courts to uphold segregation statutes by drawing inferences completely outside the record.

1. The record in this case, which may be reviewed *de novo* here,* clearly shows that the challenged portion of the

*The court below made no findings of fact. The facts are so "intermingled" with the law that *de novo* review is warranted under *Norris v. Alabama*, 294 U. S. 587 (1935) and *Watts v. Indiana*, 338 U. S. 49 (1949). Moreover, the critical facts in the record are in documentary rather than testimonial form and, because witness demeanor is thus immaterial, may be reviewed *de novo* here, *Orvis v. Higgins*, 180 F. 2d 537, 539 at n. 6 (2d Cir. 1950), *cert. den.* 340 U. S. 810. Especially since this Court is the only appellant tribunal which may review the record, *de novo* review is warranted.

statute segregates voters by race and place of origin. The legislation has carved out of the middle of Manhattan Island one virtually all-white district and one virtually all non-white and Puerto Rican district. Without further shrinking the already under-sized 17th and 18th districts, the legislature could not have drawn the district lines so as to create a more segregated pattern—that is, a single district with a higher percentage of white non-Puerto Ricans (94.9%) and another with a higher percentage of non-whites and Puerto Ricans (86.6%).

The record thus shows, as Judge Murphy found, (a) that segregation exists in fact and (b) that this segregation was purposefully created by the legislature—assuming such purposefulness is an issue in the case, which appellants deny, *infra* pp. 14-15.

Because of his view of the law, Judge Moore did not find it necessary to review the facts in detail. Judges Feinberg and Murphy, who did, came to directly contradictory conclusions. Judge Feinberg's conclusion that segregation was not proved rests upon five erroneous assumptions.

In the first place, Judge Feinberg assumes that the 1961 statute expanded the 17th district in a "logical fashion" (Appendix A, *infra*, p. 21a). This assumption ignores the fact that two areas were inexplicably omitted: the area bounded by 98th and 100th Streets and Fifth and Madison Avenues, with a population 44.5% non-white and Puerto Rican, and the area bounded by 19th and 14th Streets and Third and First Avenues, with a population 12.2% non-white and Puerto Rican. The latter area is more logically contiguous to the old 17th than the adjoining all white non-Puerto Rican Stuyvesant Town (bounded by 19th Street, First Avenue, 14th Street and the East River) which was added. Omission of these two areas results in

five additional zigzags in the boundary of the 17th district,* and their inclusion would have brought the under-sized 17th closer (by 7,489 persons) to the statewide and county-wide average.

Secondly, Judge Feinberg assumes that "many combinations of possible Congressional district lines, no matter how innocently or rationally drawn, would result in comparable figures" (*Id.* at p. 23a). There is no support whatever for this assumption; indeed, the record shows quite the contrary—namely, that short of further reducing the size of the 17th or 18th districts, it would be impossible to create one district with a higher percentage of non-whites and Puerto Ricans and one district with a higher percentage of whites.

Thirdly, Judge Feinberg assumes that only the *changes* effected by the 1961 statute are relevant (*Id.* at pp. 20a-21a). This assumption ignores the possibility, which appellants assert to be the case, that the prior boundaries of the districts were also unconstitutional and that the 1961 changes merely perpetrated and exacerbated that unconstitutionality.

Fourthly, Judge Feinberg apparently assumed that plaintiffs in a case challenging the constitutionality of a state statute have a burden of proof ("difficult burden") which is greater than that imposed upon plaintiffs in an ordinary civil case. That assumption was legally erroneous (see *infra* pp. 15-17).

Finally, Judge Feinberg assumes that proof of legislative "motive" is a prerequisite to unconstitutionality and that plaintiffs must prove such "motive" as part of their affirmative case, even in the absence of allegations and proof

*The reduction in total zigzags, emphasized by Judge Feinberg, results primarily from moving the 17th's eastern boundary over to the East River as part of its expansion required by reduction of the Island's districts from six to four. The upper East Side area thus added had become virtually all-white non-Puerto Rican (97.3%) at the time the 1961 statute was adopted (R. 123-25).

thereof by the defendants. This assumption was also legally erroneous, *infra* pp. 14-15.

Shorn of these erroneous assumptions, Judge Feinberg's conclusion becomes untenable, and Judge Murphy's view of the record must be adopted.

2. Judge Moore's opinion denies that segregated voting districts are unconstitutional absent proof of dilution of voting rights or other specific harm to the persons involved. This view raises an important question of Constitutional law, applicable in segregation cases of every variety. Although the opinion of the court in *Brown v. Board of Education*, 347 U. S. 483 (1954), noted that placing Negro students in separate schools might be harmful to the students involved, the Court's later decisions outlawing racial segregation in public parks, buses and golf courses were *per curiam* opinions citing *Brown* without a suggestion of specific injury to the individuals concerned. Although two Justices have apparently taken the position that segregated voting districts are unconstitutional, without a further showing of or dilution of voting power*, the issue has not been passed upon by this Court. If Judge Moore's opinion is allowed to stand, the states will be free to erect "separate but equal" voting districts and other governmental units.

3. Judge Moore adopts the intervenor's argument that segregated voting districts may be sustained if they benefit a particular racial group. This "benign quota" argument is in conflict with the decision in *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961), Note, 70 *Yale L.J.* 126 (1960). And see Bittker, *The Case of the Checker Board Ordinance*, 71 *Yale L.J.* 1387 (1962). The "benign quota" issue, which is dramatically presented by

*See Mr. Justice Douglas in *Baker v. Carr*, 369 U. S. 186, 244 (1962) and Mr. Justice Whittaker in *Gomillion v. Lightfoot*, 364 U. S. 339, 349 (1960).

this case, is emerging as one of the most important in racial litigation of all kinds.

4. The prevailing judges, and probably Judge Murphy as well, assert that a showing of legislative "motive" is a prerequisite to a finding of unconstitutional segregation. According to this view, a state practice or statute which has the effect of segregating persons on grounds of race or place of origin could be constitutionally justified if it were shown, by legislative history or otherwise, that this effect was achieved inadvertently in the pursuit of a different objective. This is indeed a novel doctrine of far-reaching importance in segregation cases of all kinds. If some legislative motives can overcome the effect of racial segregation, can any such motive suffice or only alternative motives which are deemed especially laudable? How does a court divine the legislative motive, especially when, as here, there is no relevant legislative history? Are not legislatures, like individuals, presumed to intend the natural consequences of their acts? And is there not a danger, if legislative motive to segregate must be shown in order to prove a case of segregation, that legislative history will be manufactured, or, as here, avoided, thus leading courts, especially this Court, into the frequent necessity of implying motives or questioning the sincerity of individual legislators' expressions?

The Court below cited no authority for its novel view that plaintiffs, in addition to showing effect, must also show legislative motive. It is of course true that legislative purpose may be relevant when the effect of a statute challenged as unconstitutional on its face may not be shown without reference to legislative purpose, *Bush v. New Orleans Parish School Bd.*, 188 F. Supp. 916 (1960), *aff'd*, 365 U. S. 569 (1961). But when effect may be readily proved,

the Court has focused solely on effect without inquiring into the motive of the legislature. See *Gomillion v. Lightfoot*, 364 U. S. 339, 341, 347-8 (1960), where the opinion refers to "effect" and "result" rather than motive or purpose. Where an effect of segregating has been shown, an alleged motive to achieve some other objective has been rejected as irrelevant, see, e. g., *Eubanks v. Louisiana*, 356 U. S. 584, 588 (1958) (purpose to preserve "local tradition" rejected). And see *Branche v. Board of Education*, 204 F. Supp. 150 (E. D. N. Y. 1962), where purpose was held irrelevant once an effect to segregate was shown.

And in cases where state action has been held to have the effect of abridging the rights of a racial minority under the First Amendment, that action is unconstitutional even if such abridgement was "unintended" and even if the purpose of the action was to protect a very real state interest, e. g., *NAACP v. Alabama*, 357 U. S. 449, 461 (1958); *NAACP v. Button*, 371 U. S. 415, 439 (1963).

Nowhere in the cases is there justification for the view advanced by Judge Feinberg in this case that a legislative motive to classify persons according to "social and economic background" could constitutionally justify a statute which has the demonstrable effect of segregating persons by race or place of origin, or Judge Moore's apparent view that any alternative motive could justify the statute.

5. Whether or not the Court below was correct in holding legislative motive a relevant factor where plaintiffs seek to prove that a state statute unconstitutionally segregates, it was certainly incorrect in the crucial matter of the standard of proof to be applied in such cases.

As indicated in cases like *Neal v. Delaware*, 103 U. S. 370, 397 (1880), *Norris v. Alabama*, 294 U. S. 587, 591, 597-98 (1935), and *Hernandez v. Texas*, 347 U. S. 475,

480-81 (1954), plaintiffs attacking the constitutionality of state action on the ground that it produces segregation make out a *prima facie* case by showing that such segregation does, in fact, exist—in other words, by demonstrating the effect of the action. It then falls on those defending the action to attempt either to rebut the plaintiff's proof, or to offer some justification for the forbidden effect. Thus in such cases traditionally, as in civil cases generally, 2 *Moore's Fed. Pract.* 1841-62 (1953), matters not within the plaintiff's *prima facie* case are reserved for affirmative defenses which must be pleaded and proved by defendants. Finally, in these cases, as in all civil cases, plaintiffs must prove their case only by a preponderance of the evidence.

The effect of Judge Feinberg's opinion is to alter these rules. His statement that appellants have a "difficult burden" in attempting to prove the unconstitutionality of the challenged statute indicates that he imposed a standard of proof higher than preponderance of the evidence. And the consequence of his unsatisfactory answers to Judge Murphy's question? "What more need plaintiffs' prove?" is to require plaintiffs, in order to be certain of proving a *prima facie* segregation case, to assume the burden of rebutting every theoretically possible motive for the challenged statute, even in the absence of allegations and proof of such motive by defending state officials. The latter is an especially unreasonable burden when, as here, there is no relevant legislative history.*

In the adversary system neither the plaintiffs nor the Court should be obliged to speculate regarding legislative motive, particularly in constitutional litigation in which the resources of the state, which is in the best position to aduce

*In this case the only legislative history is the legislative committee report, Appendix B, pp. 9b-14b, *infra*. Although this report asserts that the committee was motivated by a desire to achieve substantial numerical equality, it contains nothing which would explain the configurations of the Manhattan districts.

evidence of legislative motive, are arrayed against the private litigant. Once the plaintiffs have made an adequate showing, the Court has a right to be informed by the state regarding the basis of the statute, and it may enforce that right effectively only if, in the absence of allegations and proof by defendants, it is prepared to give judgment to the plaintiffs.

6. The judgment below rests upon Judge Feinberg's view that inferences regarding legislative motive, other than that drawn by appellants, are possible. Judge Feinberg cited only one specific example of such an inference: that the challenged portion of the statute is based upon "social and economic background." However, there is nothing in the record regarding the social and economic background of the population of the Island, and such a matter surely is not a proper subject of judicial notice. A rule permitting the Court to speculate beyond the record in order to justify state legislation challenged as creating racial segregation is surely improper and could lead to widespread abuse.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted and a hearing on the merits should be granted.

Respectfully submitted,

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Appendix A**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK****CIVIL 62-2601****Before: MOORE, C.J., and MURPHY and FEINBERG, D.JJ.****MOORE, Circuit Judge.**

Plaintiffs bring this action allegedly "to redress the deprivation, under color of the law of the State of New York, of rights, privileges and immunities secured to the plaintiffs under the Constitution and laws of the United States and to declare unconstitutional that portion of the State statute in question which deprives the plaintiffs of their rights, privileges and immunities". More specifically, they claim that the action arises under the Fourteenth and Fifteenth amendments of the Constitution of the United States, the Civil Rights Act (42 U. S. C. §§ 1983, 1988 and under 28 U. S. C. §§ 1343, 2201, 2202 and 2281). The relief sought is that a three-judge constitutional court hear and determine the case; that such portion of Chapter 980 of the 1961 Laws of New York as describes the boundaries of the 17th, 18th, 19th and 20th Congressional Districts be declared unconstitutional; that a preliminary injunction issue against the primary election on September 6, 1962¹ and the general election on November 6, 1962 on the basis of such boundaries; that a permanent injunction issue; that unless a redistricting of such four districts be made, there be an election at large in New York County for the four Congressional seats in said County; and that absent such

¹Request withdrawn during trial.

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legislative action, the court appoint a special master to re-define the boundaries of the four districts in question.

The plaintiffs allege that they reside and are registered voters in these respective districts and that each brings the action on his own behalf and all other residents of the respective districts. They ask, because of their claim that they "fairly and adequately represent" these other registered voters, that this be considered a "class suit".

The portion of the statute (Chap. 980) under attack establishes, according to plaintiffs, "irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin". Plaintiffs charge that the 17th Congressional District was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin" and that the 18th, 19th and 20th districts "have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York". They also assert that the 17th is "over-represented" and the 18th, 19th and 20th are "under-represented".

This situation, plaintiffs say, has existed for many years, that there had been repeated and energetic efforts to seek legislative correction of the abridgement of plaintiffs' constitutional rights but that they have been of no avail "because of the existing unconstitutional apportionment of the Legislature of the State of New York"; that the Legislature in successive statutes has redrawn the district boundaries in accordance with shifts in non-white and Puerto Rican populations and that the 17th has a population 12% less than the 18th, 15.4% less than the 19th and 14% less than the 20th. These allegations have been set forth at some length because of the necessity of ascertaining whether they have been established by the proof.

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At the opening of the trial six individuals, Adam Clayton Powell, J. Raymond Jones, Lloyd E. Dickens, Hulan E. Jack, Mark Southall and Antonio Mendez, by counsel moved to intervene. They were represented to be duly enrolled members of the Democratic Party and district leaders of the area comprising the 11th, 12th, 13th and 14th Assembly Districts. Adam Clayton Powell, a Negro, is now serving as Congressman from the (pre-1961) 18th Congressional District. Intervention was granted. The intervenors thereupon served their answer as intervening defendants alleging six defenses which, amongst other matters, denied that plaintiffs represented the class to which the intervenors belong and that the redistricting of the four Congressional Districts in question deprived plaintiffs of their constitutional rights. As affirmative defenses they alleged, in substance, that the test for Congressional representation is based on population rather than race, that the Republican-controlled Legislature drew the new district boundaries "along partisan political lines rather than racial lines" to "cut out as many democrats as they possibly could", that judgment as sought by plaintiffs would place in jeopardy the constitutional rights of Negroes and Puerto Ricans to representation in Congress, that a County-wide election at large would "deprive Negroes and Puerto Ricans and other minorities of fair representation and equal protection under the law", that this is not a proper class action, that "the real party in interest in this law suit is the Democratic County Committee of the County of New York", that said Committee of which intervenors are members never authorized or approved plaintiffs' action, and that plaintiffs are estopped from bringing this action because of their failure to commence it until some time after June 21, 1962 the initial date for nominating petitions.

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On the trial, plaintiffs presented certain statistical material gathered from the 1960 census figures and various maps of Manhattan Island (New York County). At the request of the court, counsel for the Attorney-General submitted maps showing the many Congressional district changes since 1911. No proof was offered by any party that the specific boundaries created by Chapter 980 were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts. Plaintiffs rely entirely upon their analyses and version of certain statistics and would impute to the Legislature the inferences they draw therefrom.

After the Eighteenth Decennial Census (1960) had been taken, the President according to law (2. U. S. C. 2a) transmitted to the Congress a statement under date of January 10, 1961 showing the number of persons in each State and "the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives by the method of equal proportions. The statement disclosed a total population of 179,323,175 for the United States and 16,782,304 for New York State. Apportioning the 435 Congressional Representatives amongst the States, New York became entitled to 41 instead of the 43 previously allotted under the 1950 census.

As a result of this required change, the Joint Legislative Committee on Reapportionment submitted to the Second Extraordinary Session of the New York Legislature on November 9, 1961 its interim report wherein it stated the need for legislative action, namely, that because of the reduction in Congressional seats all the Representatives of the State would have to be elected at large "unless new dis-

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districts not exceeding in number the number of Representatives apportioned to the state shall be created". The Committee briefly reviewed the history of the Congressional district system as follows:

In the early days of the Republic, some of the states elected by districts and some at large. The desire for local representation, however, gradually led to the adoption of the district method by the majority of the states. By 1842, of the states entitled to more than one Representative, 22 were electing their Representatives by districts, and only 6 were electing at large.

As the practice of electing by districts became firmly established, Congress, in connection with the succeeding apportionments of Representatives among the states, enacted statutes setting standards for the election of Representatives within the several states. In connection with each decennial census from 1840 to 1910, with the exception of the census of 1850, Congress enacted a law of this character. The last of these laws was the Act of August 8, 1911 (2 U. S. C. A. § 2) (37 Stat. L. 13), which provided that districts should consist of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants. There was no apportionment Act after the census of 1920. The permanent act of June 18, 1929 (46 Stat. L. 13), as originally enacted and as amended by the Act of April 25, 1940 (2 U. S. C. A. § 2a) (54 Stat. L. 162), contained no standards for the creation of districts. In *Wood against Broom*, 53 S. Ct. 1, 287 U. S. 1, 77 L. Ed. 131, a case involving the creation of Congressional districts after the apportionment under the Act of 1929, the Supreme Court held that the provisions of the Act of 1911 requiring that districts be of contiguous and compact territory and, as nearly as prac-

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licable of equal population, applied only to districts to be formed under the Act of 1911. In *Colegrove against Green*, 66 S. Ct. 1198, 328 U. S. 549, 90 L. Ed. 1432, Plaintiffs urged that an act creating Congressional districts substantially unequal in population be held invalid as violating the Fourteenth Amendment of the Federal Constitution. In that case the Supreme Court in its opinion, after citing with approval *Wood against Broom*, *supra*, stated that it was not within the competence of the court to grant the relief asked by the Plaintiffs.

Since the above cases, various bills have been introduced in Congress to provide standards to be followed by the state legislatures in creating Congressional districts. None of those bills has been enacted into law. At the present time, therefore, there are no Federal standards binding upon the states in creating Congressional districts, and there are no such standards to be found in the Constitution of statutes of New York.

The Committee then set forth the standards used by it in preparing its proposed bill, stating:

In the absence of Federal and State constitutional and statutory standards governing the creation of Congressional districts, your Committee has been obliged to determine for itself what, if any, such standards should be adopted by it in the preparation of a bill to be recommended to your Honorable Bodies. It is the conclusion of your Committee that the most important standard is substantial equality of population.

While exact equality of population is the ideal, it is an ideal that, for practical reasons, can never be attained. Some variation from it will always be necessary. The question arises as to what is a permissible fair variation.

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Your Committee has examined reports of Committee hearings on bills introduced in Congress bearing upon this subject, and reports and publications of authorities on this subject. Variations of from ten to twenty per cent from average population per district have been suggested from time to time. After considerable study, your Committee decided that a maximum variation of fifteen per cent from average population per district, the variation recommended by the American Academy of Political Science and endorsed by former President Truman, would preserve substantial equality of population and permit consideration to be given to other important factors such as community of interest and the preservation of traditional associations.

In addition to keeping the districts in its proposed bill within the maximum of the fifteen per cent variation from average population per district, your Committee has also created proposed districts of contiguous territory and has endeavored to preserve the several metropolitan areas of the state either in single districts or, where large populations made that impossible, in contiguous and closely allied districts.

New York City was singled out for special comment as follows:

In an attempt to assist the members of the Legislature in their analysis of the consideration given Metropolitan New York by your Committee we would like to point out that the population of New York City according to the 1960 Federal decennial census is 7,781,984. 19 districts have been created in the City with an average population of 409,578 per district. The remainder of the state has a population of 9,000,400 and has 22 districts with an average population of 409,109 per district. The total

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population of the state is 16,782,384. Dividing this population by 41, the total number of Representatives, gives an average population per district throughout the State of 409,326. A mere inspection of these figures will demonstrate that there has been no discrimination against New York City in the proposed bill.

Refining the population figures still further, it is obvious that New York County (Manhattan) with its population of 1,698,281 has approximately one-tenth of the total State population of 16,782,304 and, hence, should have on an equal proportion basis one-tenth of the 41 Congressional seats. This it has in being allotted four seats.

Plaintiffs do not question the necessity for the reduction of Congressional districts in the State from 43 to 41 nor the boundaries of the 37 districts outside of New York County. Inspection of these 37 districts discloses a variation in population within New York City of from 469,908 in the 12th District (Brooklyn) down to 349,850 in the 15th District (also Brooklyn) and 348,940 in the 24th District (Bronx); and in the upstate (in relation to New York City) and rural areas of from 460,409 in the 30th District comprising the counties of Saratoga, Washington, Warren, Fulton, Hamilton, Essex, Clinton and part of Rensselaer to 353,183 in the 31st District consisting of St. Lawrence, Jefferson, Lewis, Franklin and Oswego counties. An example of a merger of rural and suburban interests is found in the 25th District where Putnam's (rural) population (31,722) is merged with part of Westchester's (largely suburban) 406,687. Separating the 19 New York City districts from the 22 in the rest of the State, if the 7,781,984 persons in New York City were equally divided amongst 19 districts, there should be 409,578 per-

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sons in each district. The remaining 9,000,000 persons divided in to 22 districts should provide an average of 409,109 per district.

These figures are thus analyzed because plaintiffs frequently employ the words "under-represented" in relation to the size of the 18th, 19th and 20th districts, namely, 431,330, 445,175 and 439,456, respectively, and "over-represented" with respect to the 17th district (382,320). Testing these numbers by taking the Legislative Committee's "maximum variation of fifteen per cent from average population per district" the largest New York County district, the 18th, is less than 9% above the average and the smallest, the 17th, less than 7% below the average. Only in Kings County is found the widest range of almost 15% above and below the mean.²

During the trial the court made every effort to ascertain the real basis of plaintiffs' claim of constitutional violation. Plaintiffs stated that they intended to prove that the Legislature in enacting Chapter 980 of the Laws of 1961 "segregated the voters [in Manhattan] by virtue of race and place of origin". They limit, however, their "race" to "non-white" and their "place of origin" group to Puerto Rico. Selecting certain catch phrases from one of the *Gomillion* opinions (Mr. Justice Whittaker), they argue that the Legislature intentionally fenced Negro citizens out of the 17th District and fenced them into the 18th, 19th and 20th

²As Mr. Justice Black pointed out in his dissent in *Colegrove v. Green*, 328 U. S. 349:

There is not, and could not be except abstractly, a right of absolute equality in voting. At best there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution.

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Districts. They ask this court to find an unconstitutional Legislative intent solely on the basis of their analysis of the population content of these districts.

At the outset this court (and courts generally) should be ever watchful that it is not being made the pawn of warring political factions.³ More than suspicion of this possibility is created by the pleadings. The intervenors assert that they are the six district leaders in Assembly Districts embraced within the Manhattan Congressional Districts and that the 18th District from which Congressman Powell is the present representative and others in "public office" would be affected by any judgment in favor of plaintiffs.

Upon the trial no proof was offered which would justify a finding that plaintiffs represented a "class"; in fact, the intervenors' opposing claim dispels any such conclusion. Neither plaintiffs nor the intervenors can speak for, or truly represent the wishes of, some 400,000 persons in their districts. Each individual, however, is entitled to the benefits of constitutional equal protection and due process. But to receive judicial support for their respective causes, they must show more than a mere preference to be in some

³In *Colegrove v. Green*, 328 U. S. 549, Mr. Justice Frankfurter wrote:

Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

* * *

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.

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other district and associated for voting purposes with persons of other races or other countries of origin.

Plaintiffs' theories of unconstitutionality are difficult to pin down. First, they refer to disparity in size between the districts and have attempted in their own hypothetical districts to equalize almost exactly the population in each. They disclaim exact equality as a basis of unconstitutionality probably because of the history of 2 U. S. C. 2(a) and because of *Wood v. Broom*, 287 U. S. 1 (1932).

Although plaintiffs obliquely disavow the racial percentage theory, their statistical argument supports it. They show that of Manhattan's 1,698,281 inhabitants the 1960 census lists 1,058,589 or 62.3% as white (apparently all races and places of origin) and 639,692 or 37.7% as "non-white and Puerto Rican origin". Why the census so discriminates, plaintiffs were unable to answer except as their witness said that the census limits races to non-whites and place of origin to Puerto Rico. Plaintiffs then show that of the four districts the percentages of non-whites and Puerto Rican are 3.1%, 8.2%, 19.8% and 18.9% in the 17th, 18th, 19th and 20th Districts, respectively. From these figures plaintiffs ask this court to conclude as a matter of law that the Legislature in 1961 drew the district lines so as to intentionally deprive non-whites and Puerto Ricans of their constitutional rights. "Constitutional rights" to do what still remains unanswered. Plaintiffs apparently want a higher percentage of non-whites and Puerto Ricans in the 17th. Their neighbors, the intervenors, proclaim with equal vehemence that such a change would be violative of their rights to enjoy the redistricting as it now is. They claim, in effect, that to take a substantial number of non-

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whites and Puerto Ricans and to place them within the confines of a different Congressional district (namely, the 17th) would be an Acadia-like deportation designed to dissipate and thus make ineffectual their votes. They assert that they now have an opportunity to elect persons of their own race to represent them and their interests to legislative bodies. Plaintiffs respond that this is of no importance.

Finally and before considering the legal problems, if there be any, a brief review of New York County's congressional districts should be made. A 50-year period has been selected. In 1911 there were 9 full districts and parts of 4 other districts in New York County out of a total of 43 in the State. In 1917 the 1911 apportionment was amended changing the County to 10 full districts and parts of 3 others. Based on the 1910 census, the variation in the Congressional Districts Nos. 11-22 was slight, ranging from 204,498 to 219,772. After the 1920 census applying the 1922 Act, the variation was larger, probably due to population shifts, the low (from available figures) being 191,645 and the high 317,803. Wider disparity developed after the 1930 census, the low being 90,671 and the high 381,212. After the 1940 census and the State was allotted 45 districts, New York County was given 6 full districts and part of one other, the population range being from 257,879 to 315,639. Not until after the 1950 census was New York County allotted self-contained districts, it receiving 6 out of 43 for the State, the smallest district having a census population of 316,434 and the largest 336,441.

This suit is but one of many throughout the country seeking to take advantage of the Supreme Court's decision

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in *Baker v. Carr*, 369 U. S. 186 (1962).⁴ To inject a racial angle plaintiffs have added *Gomillion v. Lightfoot*, 364 U. S. 329, and the school segregation cases to support their thesis. However, the most drastic Procrustean treatment will not conform the shape of the present case to the patterns of those cases. *Baker v. Carr* was simply a decision that a federal court has jurisdiction to deal with and remedy such a wide disparity in voting representation as to amount to a deprivation of due process and equal protection. There the situation was particularly aggravated because the Tennessee Legislature had taken no action to comply with the state's own Constitution. A comparable hypothetical state

⁴Of the cases upon the subject of apportionment which have come to my attention, four have held the existing state apportionment provisions constitutional:

W. M. C. A., Inc. v. Simton, Civil No. 1559, S. D. N. Y., Aug. 16, 1962 (Statutory Court);

Wisconsin v. Zimmerman, Civil No. 3540, W. D. Wisc., July 25, 1962 (Statutory Court) (report of Special Master);

Cæsar v. Williams, Idaho Capital Report 161 (Sup. Ct. April 3, 1962);

Maryland Comm. for Fair Representation v. Tawes, 31 U. S. L. Week 2155 (Md. Ct. App. Sept. 25, 1962) (upper house).

Others have found the apportionment statutes in conflict with the state constitution:

Sims v. Frink, 205 F. Supp. 245 (M. D. Ala. April 14, 1962) (Statutory Court);

Harris v. Shanahan, No. 90,476, Dist. Ct. Shawnee County, Kan., May 31, 1962;

State ex rel Lein v. Sathre, 113 N. W. 2d 679 (Sup. Ct. N. D. Mar. 9, 1962);

Lein v. Sathre, 205 F. Supp. 536 (D. N. D. May 31, 1962) (Statutory Court);

Mikell v. Rousseau, No. 385, Sup. Ct. Chittenden County, Vt., May Term, 1962.

See also *Cart v. Lawrence*, Equity No. 2536, 1962 Commonwealth No. 187, C. P. Dauphin County, Pa., June 13,

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of facts would exist had the New York Legislature taken no action since 1901 when New York City held a high percentage of the State's 37 seats whereas today the City's population is only one-tenth of the State's. But this factual situation of non-action does not exist. The Legislature has taken revising action after each census and at present the ratio of voter to Representative is, as the Legislative Committee has said, on a "substantial equality of population" basis.

The *Gomillion* case has no application whatsoever. There some 400 Negro residents of the city of Tuskegee who were entitled to all the privileges of city residents including voting were deliberately disenfranchised from such

1962 (court refused to determine whether the apportionment statutes comported with the state and federal constitutions until the legislature had time to act).

Still others have held the apportionment provisions invalid under the equal protection clause of the Fourteenth Amendment:

Sanders v. Gray, 203 F. Supp. 158 (N. D. Ga. April 28, 1962) (Statutory Court);

Toombs v. Fortson, 205 F. Supp. 248 (N. D. Ga. May 25, 1962) (Statutory Court);

Moss v. Burkhardt, Civil No. 9130, W. D. Okla., June 19, 1962 (Statutory Court);

Baker v. Carr, 206 F. Supp. 341 (M. D. Tenn. June 22, 1962) (Statutory Court);

Maryland Comm. for Fair Representation v. Tawes, Equity No. 13920, Cir. Ct. Anne Arundel County, Md., May 24, 1962 (lower house);

Scholle v. Hare, Sup. Ct., Mich., July 18, 1962;

Fortner v. Barnett, No. 59965, Ch. Hinds County, Miss., 1962;

Sweeney v. Notte, C. O. No. 643, Sup. Ct., R. I., 1962.

Sims v. Frink, 208 F. Supp. 431 (M. D. Ala. 1962) (Statutory Court).

These cases for the most part involve wide disparity in the population of voting districts.

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voting by a wholly irrational drawing of new city boundaries which did not even slightly veil the obvious purpose of excluding Negroes as city voters.

The school cases are equally irrelevant. If it is to be found as a fact that only in the 17th District is there and will there be throughout the years a Congressman who alone can properly speak for the electorate of Manhattan as their representative further consideration might be given to these cases. However, both major political parties would vigorously dispute a finding that a lone Congressman from New York's 17th controls or vitally influences all actions by the Congress, no matter how able any such incumbent might be.

From various maps and figures plaintiffs ask this court to find constitutional deprivations. Actually plaintiffs have not even shown that their own voting status will be changed in any way. Prior to the reduction of New York County's Congressional seats to four, there were six districts, the 16th through 21st. In eliminating two, the Legislature apparently used the existing framework. It enlarged the 17th substantially on the north cutting into the old 18th and slightly on the south and it merged the balance of the old 18th with the 16th. The old 19th, 20th and 21st were made into two districts extending from the northerly part of Manhattan along the west side of the city around the southerly end of the island and up through the lower east side. Thus, the general district pattern was somewhat preserved despite the elimination of two districts.

No proof was tendered that the Legislature in drawing the district lines in previous years was motivated or influenced by any considerations which have become unconstitutional during subsequent years. Plaintiffs wholly failed to support their allegation of "repeated and energetic

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efforts" to seek legislative correction or that efforts were unavailing because of unconstitutional apportionment. Any challenge that correction if needed could not be made because of the composition of the State legislature is squarely met by the recent decision in *WMCA Inc. et al v. Simon et al*, 61 Civ. 1559, S. D. N. Y., August 16, 1962, wherein after a trial a three-Judge court found with respect to the apportionment of Senate and Assembly districts that the apportionment provisions of the State of New York are rational, not arbitrary, are of substantially historical origin, contain no geographical discrimination, permit an electoral majority to alter or change the same and are not unconstitutional under the relevant decisions of the United States Supreme Court. Certainly federal congressional redistricting would not affect New York legislative action and plaintiffs in this action have not attacked New York's method of creating its own Legislature. Nor has any proof been offered to indicate in any way that the Legislature in its various congressional boundary enactments from 1901 to date has redrawn district lines in conformity with non-white and Puerto Rican population shifts.

This case presents an example of an attempt to apply theories of completely unrelated situations (*Baker v. Carr*, *Gomillion* and the school cases). That the effort appears forced is not surprising. If the Legislature had created two Congressional districts in Manhattan each consisting of 100,000 persons, one almost wholly of race A and the other of race B and assigning the balance of the County to two districts of 700,000 each, the question of discrimination might well be raised; but it did not so act.

No citizen of Manhattan, as a result of the legislative redistricting, has been deprived of his right to vote for the

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duly nominated candidates of the party of his choice and in the area in which he resides. Wherever areas have to be divided into districts, there will be voters who may prefer to vote in districts other than their own but such deprivation is not a constitutional deprivation. In any large city it is not unusual to find that persons of the same race or place of origin have a tendency to settle together in various areas. Often this understandable practice enables them to obtain representation in legislative bodies which otherwise would be denied to them. Where geographic boundaries include such concentrations there will be a higher percentage of one race in one district than in others. To create districts based upon equal proportions of the various races inhabiting metropolitan areas would indeed be to indulge in practices verging upon the unconstitutional. Equally unconstitutional would appear to be plaintiffs' suggestion that only in Manhattan should there be an election at large of its four Congressional Representatives and that the district system be used elsewhere in the State. Any such legislation would definitely tend to abridge the voting status, if not the actual voting rights, of residents of Manhattan.

Plaintiffs having failed upon the facts and the law to establish any violation of their constitutional rights as a result of the action of the New York Legislature in enacting Chapter 980 of the Laws of 1961, the complaint must be dismissed. No costs.

FEINBERG, D. J.

I concur in the result reached by Judge Moore because I feel that plaintiffs have not met their burden of proving that the boundaries of the new 17th, 18th, 19th, and 20th Congressional Districts were drawn along racial lines, as

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they allege. I differ from the opinion of Judge Moore, however, in two major respects.

1. Judge Moore's opinion in several places implies that it is necessary for plaintiffs to show not only that the boundaries of the congressional districts were drawn on racial lines but also that there was some other dilution or diminution of the plaintiffs' right to vote. I disagree with this implication. If plaintiffs had proved that the district lines were constituted on a racial basis, the fact that plaintiffs had an undiminished right to vote in such gerrymandered districts would be irrelevant. The constitutional vice would be use by the legislature of an impermissible standard, and the harm to plaintiffs that need be shown is only that such a standard was used. *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), and *Baker v. Carr*, 369 U. S. 186 (1962), provide support for the view that racially gerrymandered districts violate the Fifteenth Amendment, which provides that: "The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." In *Baker*, Mr. Justice Douglas referred to the *Gomillion* case as an instance "where a federal court enjoins gerrymandering based on racial lines,"¹ and further stated that:

"Race, color, or previous condition of servitude is an impermissible standard by reason of the Fifteenth Amendment, and that alone is sufficient to explain *Gomillion v. Lightfoot*, 364 U. S. 339."²

¹369 U. S. at 250 n. 5.

²*Id.* at 344. But see the concurring opinion of Mr. Justice Whittaker in *Gomillion* where he stated that there was no violation of the Fifteenth Amendment by racial redistricting as long as the complaining voter enjoys the same right to vote as all others in the same district. *Gomillion v. Lightfoot*, 364 U. S. 339, 349 (1960). Under those circumstances, however, Mr. Justice Whittaker thought there would be a violation of the Equal Protection Clause of the Fourteenth Amendment. *Ibid.*

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It is true that the emphasis in the *Gomillion* opinion is on the deprivation of a pre-existing right to a municipal vote. However, analysis of that case indicates that the Negroes of Tuskegee were free to establish their own separate municipality merely by filing a petition signed by 25 persons.³ The view that racially drawn districts *per se* would also violate the Equal Protection Clause of the Fourteenth Amendment finds support in the *per curiam* decisions of the Supreme Court following *Brown v. Board of Educ.*, 347 U. S. 483 (1954). These cases⁴ outlawed racial segregation in public parks, beaches, buses, and golf courses without any discussion of harm resulting from discrimination in the use of those facilities. The issue can be posed by assuming a state statute which on its face indicated that all Negro voters would vote in one district and all white voters in another, with the number of persons in each district approximately equal. I have little doubt that such a statute would be held unconstitutional, but whether under the Fourteenth or Fifteenth Amendment, or both,⁵ need not be decided now, in view of plaintiffs' failure to prove their case.

The intervenors contend that redistricting along the lines suggested by plaintiffs would, in effect, jeopardize the

³See Lucas, *Dragon In The Thicket: A Perusal of Gomillion v. Lightfoot*, Supreme Court Review 194, 210-11 (1961), where the author also suggests additional reasons for viewing the case as barring any segregation of voters even absent a technical loss of voting rights.

⁴*New Orleans City Park Improvement Ass'n v. Detiege*, 358 U. S. 54 (1958); *Gayle v. Browder*, 352 U. S. 903 (1956); *Holmes v. Atlanta*, 350 U. S. 879 (1955); *Mayor v. Dawson*, 350 U. S. 877 (1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U. S. 971 (1954). See *Fay v. New York*, 332 U. S. 261, 292-93 (1947). See also *Hernandez v. Texas*, 347 U. S. 475, 478 (1954); *Nixon v. Hurd*, 273 U. S. 536, 541 (1927).

⁵Plaintiffs here rely on both Amendments.

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"control" by non-whites and Puerto Ricans of at least one congressional district. This—the loss of an alleged advantage to the class of voters plaintiffs claim to represent—is as irrelevant to the constitutional issue as the need to show some harm other than that inherent in the drawing of district lines on a racial basis. The argument assumes that under the Constitution there can be "good" segregation along racial lines as against "bad" segregation.⁶ With respect to redistricting, the answer to this is found in Mr. Justice Harlan's famous phrase that the Constitution is color-blind.⁷

2. The case is a closer one for me than the opinion of Judge Moore would indicate it is for him. Plaintiffs did introduce evidence which might justify an inference that racial considerations motivated the 1961 reapportionment of congressional districts in Manhattan. However, other inferences, as set forth below, are equally or more justifiable. Plaintiffs have a difficult burden to meet in attacking the constitutionality of this state statute. See *Baker v. Carr*, *supra*, at 266 (Stewart, J., concurring); *W. M. C. A.*,

⁶See *Hughes v. Superior Court*, 339 U. S. 460 (1950) (picketing to compel the hiring of employees in proportion to the racial origin of employer's customers enjoined); cf. *Progress-Dev. Corp. v. Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960), *rev'd in part*, 286 F. 2d 222 (7 Cir. 1961) (real estate developer's imposition of a "benevolent" quota); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 Yale L. J. 1387 (1962), and authorities collected therein.

⁷In his dissent in *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896), Mr. Justice Harlan stated: "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

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Inc. v. Simon, 208 F. Supp. 368, 373 (S. D. N. Y. 1962).

Upon analysis, I do not think that burden has been met.

In the 1961 redistricting, the legislature had to compress six New York County districts into four. This was done in what appears to be a logical fashion. Thus, in the 17th Congressional District, upon which plaintiffs have particularly focused, the legislature started with the outlines of the District as it was before and moved the lines in a rational manner. The area was expanded considerably on the east to the East River and to the north in even and contiguous fashion. This resulted in straighter and apparently more logical congressional lines than before, and most of the prior jigsaw appearance of the District lines on the eastern boundary was eliminated.⁸ Thus, examination of the actual changes effected by the 1961 redistricting does not support plaintiffs' contention of racial discrimination. It is proper, of course, to focus primarily on these changes rather than the changes on the western boundaries of the 17th District legislated in 1941 and 1951. As to the 1941 changes, plaintiffs themselves concede in their post-trial memorandum that "a pattern of discriminatory fencing out of the 17th District really began to emerge only with the 1951 redistricting."⁹ In any event, as to the western side of the 17th District generally (which the 1961 redistricting did not change), the record indicates that if the zigzags were now eliminated, the number of non-whites and Puerto Ricans brought into the District by this correction of the boundary lines would approximately equal the number of non-whites and Puerto Ricans excluded by

⁸The 17th District apparently had 49 lines prior to the 1961 redistricting and 31 subsequent to it.

⁹Post-trial Brief for plaintiffs, p. 19.

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the change.¹⁰ I am not asserting that prior lines, once drawn, could not become discriminatory because the legislature, for racial reasons, deliberately failed to act over the years. However, in this case the proof adduced falls far short of establishing that contention. Therefore, the principal area of inquiry must be the changes brought about by the 1961 redistricting, and as to these, the district lines seem more rational than before.

One of plaintiffs' principal contentions is that if the 17th District were to be expanded in any direction so as to be made reasonably equal in population to the other congressional districts in New York County, any area to be added would substantially increase the percentage of non-whites and Puerto Ricans in the 17th District. Plaintiffs argue, therefore, that the 17th District's population was deliberately kept unreasonably low to avoid this result. However, although the population of the 17th District is appreciably smaller than its neighboring districts, it is still only about 27,000 below the average for the state, or less than 7 per cent, as Judge Moore points out. It is true that increasing the population of the 17th District to the average by moving the district lines up or down in contiguous fashion would probably result in a higher percentage of non-whites and Puerto Ricans in that District. However, a variation of only 7 per cent from the average does not, in my mind, justify a finding of racial discrimination.

The dissenting opinion notes that defendants and the intervenors might have proved that the district lines in question were drawn "as part of a political compromise between the major political parties" but that no proof of this was submitted. Although the intervenors raised as a defense

¹⁰Record, p. 134.

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the contention that the boundaries of the 17th District were formed "along partisan political lines rather than racial lines," there is no evidence in the record bearing on this issue.¹¹ Therefore, as I see it, none of the opinions in this case deal with the question of whether the drawing of district lines on a political basis would be constitutionally permissible.¹²

Apart from political considerations, then, the dissenting opinion concludes that "the only available inference" from the figures on percentages of non-whites and Puerto Ricans relied upon by plaintiffs is one of legislative intent to draw district lines on the basis of race and national origin. I do not agree that this is the only available inference. On the record in this case, the figures give rise to another inference equally, or more, persuasive. That inference is that since the non-whites and Puerto Ricans in Manhattan live in certain concentrated areas (see Plaintiffs' Exhibit 4), many combinations of possible congressional district lines, no matter how innocently or rationally drawn, would also result in comparable figures. This is made clear, for example, by one of plaintiffs' three suggested alternative methods of drawing congressional district lines in Manhattan. Under plaintiffs' proposed Plan B, the percentage of non-whites and Puerto Ricans in one district would be 9.5

¹¹After the close of hearings, the Court requested the parties, by stipulation, to furnish additional information as to population, voting and enrollment figures for certain designated areas. However, plaintiffs objected to the relevance of this information and to the procedure by which it was being obtained. Therefore, the Court is not considering as part of the record before it the information which was furnished by defendants.

¹²In a supplemental brief, plaintiffs contend that it would not be. See Bickel, *The Durability of Colegrove v. Green*, 72 Yale L.J. 39, 43 (1962).

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per cent, while in another district it would be 59.1 per cent. Even though these percentages differ greatly, would racial discrimination be "the only available inference" from these figures? Clearly, since plaintiffs have suggested the plan, such an inference would not be available at all, much less be the only available inference.

The dissent also properly asks, "What more need plaintiffs prove?" Some answers might be: a failure to build upon prior lines in a rational, logical manner, a greater population disparity, and an increase in boundary zigzagging. If plaintiffs had shown, for example, a failure to increase the population in the 17th District enough to keep it within a fair approximation of the statewide average, a stronger inference might be drawn that the population was deliberately kept small because adding to it could only increase the non-white percentage. In addition, if the increase had been achieved by aggravating the jigsaw nature of the boundaries or by drawing them in a serpentine manner,¹³ a different case might be presented. It is true that there was some jigsawing at the top and the bottom of the new 17th District, but this was very slight. For example, Stuyvesant Town, which has a very small non-white and Puerto Rican population, was added to the District at the bottom, but the immediately adjacent area to the west, with an appreciably higher percentage of non-whites and Puerto Ricans, was not. The addition of Stuyvesant Town to the District, however, does not give rise only to the inference of racial discrimination. It also gives rise to the inference, equally persuasive, that the social and economic background of the residents of Stuyvesant Town made a unit which logically had a community of interest with the residents of

¹³Cf. *Gomillion v. Lightfoot*, 364 U. S. 339 (1960).

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the 17th District.¹⁴ In short, based upon the entire record, I do not feel that plaintiffs have proved their case.

MURPHY, D. J. (Dissenting).

The majority opinions both find that plaintiffs have failed in their proof, i.e., they have not proved a *prima facie* case of unconstitutional deprivation of their rights.

I disagree and find that plaintiffs have borne their *prima facie* burden (*Hernandez v. Texas*, 347 U. S. 475) and because of the absence of any proof by defendants or intervenors they are entitled to judgment declaring the challenged portion of Chapter 980 unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. Let me premise my reasons with a few concessions.

I concede that there was a total absence of direct proof of any specific intent by the New York Legislature in drawing the lines of any district; I concede that disparity alone in the population of one district compared to another or to a general state or city average is not dispositive; I

¹⁴See *Baker v. Carr*, 369 U. S. 186, 323 (1962) where Mr. Justice Frankfurter stated:

"Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others."

While it is true that this language came from the dissenting opinion, it does not appear that the majority of the Court would disagree with this analysis of the apportionment process.

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concede that of itself a district's lines whether jigsaw, straight, serpentine or otherwise would not be controlling; I concede that some disproportion of numbers of ethnic groups in adjoining districts would not be enough; I concede that the federal courts should ordinarily refrain from entering into "political thickets" and that it is beyond our competence to suggest or supervise a remedy for unlawful apportionment. But see *Inequities in Districting for Congress: Baker v. Carr* and *Colegrove v. Green*, 72 Yale L. J. 13 (1962).

The uncontradicted proof submitted by plaintiffs, however, establishes a visual figure picture of the end results of the recent redistricting of Manhattan Isle (New York County) as follows:

Manhattan has a population of 1,698,281 people and is entitled to four Congressmen. The census figures of 1960 divided the ethnic groups into only two classes—white and non-white and Puerto Rican. These classes have been counted and according to the census 1,058,589 or 62.3% are white and 639,622 or 37.7% are non-white and Puerto Rican.

The district lines as fixed by Chapter 980 created the four districts in question with the following make-up:

| District | Total Population | White Population % of District | | Non-White and Puerto Rican Origin Population of District | |
|----------|------------------|-----------------------------------|-------|--|-------|
| 17th | 382,320 | 362,668 | 94.9% | 19,652 | 5.1% |
| 18th | 431,330 | 59,216 | 13.7% | 372,114 | 86.3% |
| 19th | 445,175 | 318,223 | 71.5% | 126,952 | 28.5% |
| 20th | 439,456 | 318,482 | 72.5% | 120,974 | 27.5% |
| Total | 1,698,281 | 1,058,589 | 62.3% | 639,692 | 37.7% |

The following table shows the percent of non-white persons and persons of Puerto Rican origin in each Con-

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gressional district in relation to the total number of such persons in the entire county:

| <u>District</u> | <u>% of Non-White and Puerto Rican of County</u> |
|-----------------|--|
| 17th | 3.1% |
| 18th | 58.2% |
| 19th | 19.8% |
| 20th | 18.9% |
| | <hr/> 100.0% |

The figure picture of the 17th District shows that the lines as drawn encompass a population 94.9% white and 5.1% non-white and Puerto Rican. It further shows it has a population of 382,320 people, or between 15.4% and 12% less than any of the adjoining districts. The 18th District encompasses a population that is 86.3% non-white and Puerto Rican and only 13.7% white. Its population of 431,330 people is 12% more than the 17th and 5% above the state average.

It is my judgment that the only available inference from the above uncontradicted figure picture establishes *per se* a *prima facie* case of a legislative intent to draw Congressional district lines in the 17th and 18th Districts on the basis of race and national origin. To me it fits foursquare with Mr. Justice Frankfurter's statement in *Gomillion v. Lightfoot*, 364 U. S. 339, 341, that the act in question was not an ordinary geographical redistricting measure even within the familiar abuses of gerrymandering. Although Justice Frankfurter's statement referred to the court's holding that there was a violation of the Fifth Amendment this statement is equally apposite to the Equal Protection Clause of the Fourteenth Amendment under *Brown v.*

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Board of Education, 347 U. S. 483. Cf. the concurring opinion of Mr. Justice Whittaker in *Gomillion* at 349. The conclusion here is, as in *Gomillion*, irresistible, tantamount for all practical purposes, to a mathematical demonstration that the legislation was solely concerned with segregating white, and colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th).

We assume that had the district lines of the 17th District been drawn so as to exclude all non-white and Puerto Ricans, or the 18th to exclude all white, my brothers would agree that plaintiffs had established a *prima facie* case of *per se* segregation. *Gomillion v. Lightfoot*, *supra*. It is acknowledged, however, that plaintiffs' uncontradicted evidence demonstrates that New York County, an island having 639,692 non-white and Puerto Ricans or 37.7% of the total population, was redistricted into four Congressional districts with one district, the 17th, having only 5.1% non-whites and Puerto Ricans and the 18th with only 13.7% white.

The question then posed is—Does the fact that the Congressional district lines decreed by the State Legislature for the 17th District to encompass only 5.1% non-white and Puerto Rican and the 18th only 13.7% white as distinguished from 0% so dilute plaintiffs' proof as to require them to prove more? If so, did they do it when the uncontradicted proof also showed that the 17th District had 15.4% less people than the adjoining 19th District; 14% less than the 20th and 12% less than the 18th. My brothers say "No" and I disagree.

It might very well be that the defendants and intervenors could have offered proof to counteract the inference

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of racial segregation that plaintiffs proof implies but they did not—and furthermore they chose not to do so. They might have proved all of the factors enumerated by Mr. Justice Frankfurter in *Baker v. Carr*, 369 U. S. 186 at 323, that go into the complicated political potpourri of apportionment. They might have proved that the lines were drawn as part of a political compromise between the major political parties to insulate certain sections for “traditional purposes”—but the simple answer is that they did not.

What more need plaintiffs prove? Surely it cannot be argued that they must prove some oral or written statement made by the legislature either in the form of a committee report or from the manager of the bill, or statements from the legislators themselves. It is undisputed that no public hearings were had on the bill and that the only report filed was the interim report of the Joint Legislative Committee on Reapportionment referred to by Judge Moore. The bill recommended was submitted to the legislature on November 9, 1961, and passed on November 10, 1961, and was signed by the Governor that day. N. Y. Sess. Laws, 2d Extraordinary Sess. 1961, c. 980, §§ 110-12.

Judge Feinberg and I part company only on the quantum of plaintiffs' proof. He agrees that the plaintiffs are not required to prove any diminution or dilution of their voting rights. They prove their *prima facie* case once they show that the district lines were constituted on racial basis but he agrees with Judge Moore that the plaintiffs have not proved enough—but neither opinion tells us how much more or enough of what.

Judge Feinberg states that the principal area of the inquiry must be the changes brought about by the 1961 redistricting. With this as his premise he points out that the 17th District has approximately only 7% less popula-

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tion than the average for the state and such disproportion does not justify a finding of racial discrimination. I agree.

All I say is, it is a factor or a fact to be considered with all of the others, keeping in mind that the legislature was dividing an island into four districts and such island contained 37.7% non-white and Puerto Ricans.

He also suggests that the word picture of figures would infer not discrimination along racial lines but rather that non-white and Puerto Ricans live in certain concentrated areas so that district lines encompassing these areas would necessarily include a very high percentage of non-whites and Puerto Ricans. This is exactly my point and also the plaintiffs'. The pattern of the 18th District lines shows that they were drawn so that any district lines encompassing these areas would necessarily include a very high percentage of non-whites and Puerto Ricans. And, we might add, a very high percentage of whites in the 17th.

In answer to my question—What more need plaintiffs prove? He says some answers might be—not should be, but might be: (a) *Failure to build on prior lines in a rational, logical manner.* This presumes that the prior lines were without any constitutional infirmity. In any event, how does one build four districts on foundations of six districts? (b) *A greater population disparity.* It is suggested that if the plaintiffs had shown a failure to increase the population in the 17th District enough to keep it without a fair approximation of the state average a stronger inference might be drawn that the population was deliberately kept small because adding to it could only increase the non-white and Puerto Rican percentage. The 17th District is 7% below the state average. Would 8% be enough, or 9%, or 10%, etc.? What is a fair approximation? Isn't it really

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a question of fact? How do you weigh such questions when a defendant offers no proof? I submit that the scale tips toward the plaintiffs. The City of New York with 7,781,984 people has been divided by the legislature into 19 districts with an average population per district of 409,578. It is true that the New York City average population almost equals the average population per district throughout the state. But why must we make comparisons with the entire 19 districts in the City of New York or the entire 41 districts in the state? We are dealing with Manhattan Island which for all practical purposes is a unique metropolitan area with many well-known river to river cross streets and famous north and south or longitudinal streets. See, for example, the plaintiffs, other proof in which they demonstrated by three hypothetical divisions how the island could have been divided into four districts on a logical and rational basis using the natural boundaries or well-known streets and avenues. I agree that such hypothetical districts are not conclusive but they do have some probative value and I think are helpful in pointing up the obvious segregation that the legislature effected. (c) *An increase in boundary zigzagging.* How much of an increase and how is the number of zigzags measured or counted, and do you compare the zigzagging lines with the lines drawn by the legislature in 1951 or 1941, and do you confine yourself to Manhattan Island or New York City or any district in any part of the state.

I agree that no plaintiff, or for that matter any person on Manhattan Island, has lost or been deprived of a right to vote for Congress or that his vote will not be counted but the parallel to *Gomillion* (concurring opinion) is clear. There it was a glaring exclusion of Negroes from a muni-

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cipal district. Here it is a subtle exclusion from a "silk stocking district" (as the 17th is so frequently referred to) and a jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the inter-venors.

We are told that the Fifteenth Amendment nullifies sophisticated as well as simple-minded discrimination. In my judgment the New York legislature has attempted, in violation of the Equal Protection Clause of the Fourteenth Amendment, a sophisticated and subtle discrimination. Accordingly, I would give judgment for plaintiffs that the challenged part of the act is unconstitutional.

APPENDIX B

United States Constitution, Federal Statutes and State Statutes Involved

UNITED STATES CONSTITUTION; Amendment XIV, § 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

UNITED STATES CONSTITUTION; Amendment XV, § 1:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude. * * *"

FEDERAL STATUTES:

U. S. C., Title 42, Sections 1983 and 1988:

"§ 1983 Civil Action for deprivation of rights—

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

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at law, suit in equity, or other proper proceeding for redress.

"§1988. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and title 18 for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are different in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty."

U. S. C. Title 28, Section. 1343, § (3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. * * * To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any rights, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

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The Federal Declaratory Judgment Act. U. S. C., —
Title 28, Sections 2201 and 2202:

“§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

“§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.”

U. S. C. Title 2, Section 2a:

“§ 2a. Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State

Appendix B

would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) If there is an increase in the number of Representatives, such additional Representative or

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Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."

STATE STATUTES: CHAPTER 980; 1961 Laws of the State of New York

"§ 110. Present congressional districts

The congressional districts of this state, as existing immediately before the time this article takes effect, shall continue to be the congressional districts of the state until the expiration of the terms of the representatives in congress then in office, except for the purpose of an election of representatives in congress for full terms beginning at such expirations."

"§ 111. New congressional districts

Except as provided in section one hundred ten, the congressional districts of this state from and after the time this article takes effect, shall consist as follows:

* * *

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"SEVENTEENTH. The Seventeenth Congressional District shall consist of that part of New York County described as follows: Beginning at a point where East Fourteenth Street extended intersects the waters of the East River, thence Westerly along East Fourteenth Street extended and East Fourteenth Street to First Avenue, to East Nineteenth Street, to Third Avenue, through Cooper's Square, to the Bowery, to Great Jones Street (West Third Street), to The Avenue of the Americas (Sixth Avenue), to West Fourth Street, to Christopher Street, to Bleecker Street, to Abbington Square, thence Northerly along Eighth Avenue to West Fourteenth Street, to Seventh Avenue, to West Thirty Fourth Street, to Eighth Avenue, to West Fifty Fourth Street, to Ninth Avenue, thence Northerly along Ninth Avenue and Columbus Avenue, to West Seventy Third Street, to Central Park West, to the intersection of Cathedral Parkway, Central Park West and West One Hundred Tenth Street, thence Easterly along West One Hundred Tenth Street to Fifth Avenue, thence Southerly along Fifth Avenue to East Ninety Eighth Street, to Madison Avenue, to East Ninety Seventh Street, to Park Avenue, to East Ninety Sixth Street, to Lexington Avenue, to East Ninety First Street, to Third Avenue, to East Eighty Ninth Street, to East End Avenue, thence Northerly along East End Avenue and East End Avenue extended to the waters of the East River, thence through the waters of the East River and the East River Channel to the place of beginning including Welfare Island.

(Population 1960 Federal Census 382,320.)"

• "EIGHTEENTH. The Eighteenth Congressional District shall consist of that part of New York County

Appendix B

described as follows: Beginning at a point where West One Hundred Sixty Fifth Street extended Easterly intersects the waters of the Harlem River, thence Westerly along West One Hundred Sixty Fifth Street extended and West One Hundred Sixty Fifth Street to Edgecombe Avenue, to St. Nicholas Place, to West One Hundred Fiftieth Street, to Amsterdam Avenue, thence Southerly along Amsterdam Avenue to West One Hundred Twenty Second Street, to Morningside Drive, to Cathedral Parkway, thence Easterly along Cathedral Parkway and West One Hundred Tenth Street to Fifth Avenue, thence Southerly along Fifth Avenue to East Ninety Eighth Street, to Madison Avenue, to East Ninety Seventh Street, to Park Avenue, to East Ninety Sixth Street, to Lexington Avenue, to East Ninety First Street, to Third Avenue, to East Eighty Ninth Street, to East End Avenue, thence Northerly along East End Avenue and East End Avenue extended to **the waters** of the Harlem River and through the waters of the Harlem River, Hell Gate, East River, Harlem River, to the place of beginning, including Randalls Island, Ward's Island and Mill Rock.

(Population 1960 Federal Census 431,330)"

"NINETEENTH. The Nineteenth Congressional District shall consist of that part of New York County described as follows: Beginning at a point where East Fourteenth Street extended intersects the waters of the East River, thence Westerly along East Fourteenth Street extended and East Fourteenth Street, to First Avenue, to East Nineteenth Street, to Third Avenue, through Cooper's Square to the Bowery, to Great Jones Street (West Third Street), to The Avenue of the

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Americas (Sixth Avenue), to West Fourth Street, to Christopher Street, to Bleecker Street, to Abbington Square, thence Northerly along Eighth Avenue, to West Fourteenth Street, to Seventh Avenue, to West Thirty Fourth Street, to Eighth Avenue, to West Fifty Fourth Street, to Ninth Avenue, thence Northerly along Ninth Avenue and Columbus Avenue, to West Seventy Third Street, to Central Park West, to West Eighty Sixth Street, thence Westerly along West Eighty Sixth Street and West Eighty Sixth Street extended to the waters of the Hudson River, thence Southerly through the waters of the Hudson River, New York Bay, Buttermilk Channel, the East River to the place of beginning, including Governor's Island, Bedloe's Island and Ellis Island. (Population 1960 Federal Census 445,175)"

"TWENTIETH. The Twentieth Congressional District shall consist of that part of New York County beginning at a point where West One Hundred Sixty Fifth Street extended Easterly intersects the waters of the Harlem River, thence Westerly along West One Hundred Sixty Fifth Street extended and West One Hundred Sixty Fifth Street to Edgecombe Avenue, to St. Nicholas Place, to West One Hundred Fiftieth Street, to Amsterdam Avenue, thence Southerly along Amsterdam Avenue to West One Hundred Twenty Second Street, to Morningside Drive, to Cathedral Parkway, to Central Park West, to West Eighty Sixth Street, thence along West Eighty Sixth Street extended to the waters of the Hudson River, thence Northerly through the waters of the Hudson River, Harlem River, to the dividing line between the County of Bronx and the County of New York, thence Northerly, Easterly

Appendix B.

and Southerly along said dividing line to the waters of the Harlem River, thence Southerly through the waters of the Harlem River to the place of beginning. (Population 1960 Federal Census 439,456)"

* * *

"§ 112. Definitions

"The words 'county', 'city', 'town', 'village', 'ward', and 'election district' as used in this article refer to counties, towns, villages, wards and election districts as constituted on November first, nineteen hundred sixty-one.

"§ 2. This act shall take effect January first, nineteen hundred sixty-two."

NEW YORK STATE LEGISLATIVE DOCUMENT NO. 45 (1961)

"The text of the Interim Report of the Joint Legislative Committee on Reapportionment which was submitted to the Second Extraordinary Session of the Legislature on November 9, 1961, follows:

To the Legislature of the State of New York:

Q. "The Joint Legislative Committee on Reapportionment created by concurrent resolution adopted March 29, 1949, and last continued until March 31, 1962, by concurrent resolution adopted March 24, 1961, submits the following as its interim report, relating to the creation of new Congressional districts."

NECESSITY FOR THE CREATION OF NEW
CONGRESSIONAL DISTRICTS

"Under Federal Law, after each Federal decennial census an apportionment of the four hundred and thirty-

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five Members of the House of Representatives is made among the several states by the method known as the method of equal proportions. Such apportionment involves only a mathematical operation.

"After the 1960 decennial census, the apportionment of Members of the House of Representatives by the above described method resulted in a reduction from 43 to 41 of the number Representatives apportioned to New York. Federal Law further provides that, where the number of Representatives apportioned to a state is reduced and the number, as so reduced, is less than the number of districts in the state, all of the Representatives apportioned to the state shall be elected at large, unless new districts not exceeding in number the number of Representatives apportioned to the state shall be created. Since New York now has 43 districts and only 41 Representatives have been apportioned to it under the present apportionment, it will be necessary to elect all 41 Representatives at large at the 1962 election, unless 41 new districts are created prior to that time. To include on the ballot for that year candidates for 41 seats in the House of Representatives in addition to candidates for state, local and judicial offices would, in the opinion of your committee, make a mockery of the election."

**FEDERAL LAW REGULATING CONGRESSIONAL
DISTRICTING WITHIN THE STATES**

"The Federal Constitution provides for the apportionment of Representatives among the several states. It further provides that the times, places and manner of holding elections for Representatives shall be prescribed

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in each state by the Legislature thereof, but that Congress may at any time by law make or alter such regulations.

"In the early days of the Republic, some of the states elected by districts and some at large. The desire for local representation, however, gradually led to the adoption of the district method by the majority of the states. By 1842, of the states entitled to more than one Representative, 22 were electing their Representatives by districts, and only 6 were electing at large.

"As the practice of electing by districts became firmly established, Congress, in connection with the succeeding apportionments of Representatives among the states, enacted statutes setting standards for the election of Representatives within the several states. In connection with each decennial census from 1840 to 1910, with the exception of the census of 1850, Congress enacted a law of this character. The last of these laws was the Act of August 8, 1911¹ (37 Stat.L. 13), which provided that districts should consist of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants. There was no apportionment Act after the census of 1920. The permanent act of June 18, 1929 (46 Stat.L. 13), as originally enacted and as amended by the Act of April 25, 1940² (54 Stat.L. 162), contained no standards for the creation of districts. In *Wood against Broom*, 53 S.Ct. 1, 287 U.S. 1, 77 L.Ed. 131, a case involving the creation of Congressional districts after the apportionment under the Act of 1929, the Supreme Court held that the provisions

¹2 U.S.C.A. § 2.

²2 U.S.C.A. § 2a.

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of the Act of 1911 requiring that districts be of contiguous and compact territory and, as nearly as practicable of equal population, applied only to districts to be formed under the Act of 1911. In *Colegrove against Green*, 66 S.Ct. 1198, 328 U.S. 549, 90 L.Ed. 1432, Plaintiffs urged that an act creating Congressional districts substantially unequal in population be held invalid as violating the Fourteenth Amendment of the Federal Constitution. In that case the Supreme Court in its opinion, after citing with approval *Wood against Broom*, supra, stated that it was not within the competence of the court to grant the relief asked by the Plaintiffs.

"Since the above cases, various bills have been introduced in Congress to provide standards to be followed by the state legislatures in creating Congressional districts. None of those bills has been enacted into law. At the present time, therefore, there are no Federal standards binding upon the states in creating Congressional districts, and there are no such standards to be found in the Constitution or statutes of New York."

STANDARDS ADOPTED BY THE COMMITTEE

"In the absence of Federal and State constitutional and statutory standards governing the creation of Congressional districts, your Committee has been obliged to determine for itself what, if any, such standards should be adopted by it in the preparation of a bill to be recommended to your Honorable Bodies. It is the conclusion of your Committee that the most important standard is substantial equality of population.

"While exact equality of population is the ideal, it is an ideal that, for practical reasons, can never be at-

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tained. Some variation from it will always be necessary. The question arises as to what is a permissible fair variation.

"Your Committee has examined reports of Committee hearings on bills introduced in Congress bearing upon this subject, and reports and publications of authorities on this subject. Variations of from ten to twenty per cent from average population per district have been suggested from time to time. After considerable study, your Committee decided that a maximum variation of fifteen per cent from average population per district, the variation recommended by the American Academy of Political Science and endorsed by former President Truman, would preserve substantial equality of population and permit consideration to be given to other important factors such as community of interest and the preservation of traditional associations.

"In addition to keeping the districts in its proposed bill within the maximum of the fifteen per cent variation from average population per district, your Committee has also created proposed districts of contiguous territory and has endeavored to preserve the several metropolitan areas of the state, either in single districts or, where large populations made that impossible, in contiguous and closely allied districts."

NEW YORK CITY AND THE REMAINDER OF THE STATE

"In an attempt to assist the members of the Legislature in their analysis of the consideration given Metropolitan New York by your Committee we would like to point out that the population of New York City according to the 1960 Federal decennial census is

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7,781,984. 19 districts have been created in the City with an average population of 409,578 per district. The remainder of the state has a population of 9,000,400 and has 22 districts with an average population of 409,109 per district. The total population of the state is 16,782,384. Dividing this population by 41 the total number of Representatives gives an average population per district throughout the State of 409,326. A mere inspection of these figures will demonstrate that there has been no discrimination against New York City in the proposed bill."

CONCLUSION

"The proposed bill of the Committee and the exhibits annexed thereto are included in the Appendix³ following this report."

ACKNOWLEDGMENTS

"Your Committee wishes to express its thanks to Mr. C. Burr Reed, Consultant to the Committee and to its Counsel, Associate Counsel and Staff for their assistance to the Committee in carrying out its task.

Dated: November 9, 1961.

Respectfully submitted,

ROBERT C. McEWEN, *Chairman*

ROBERT M. QUIGLEY

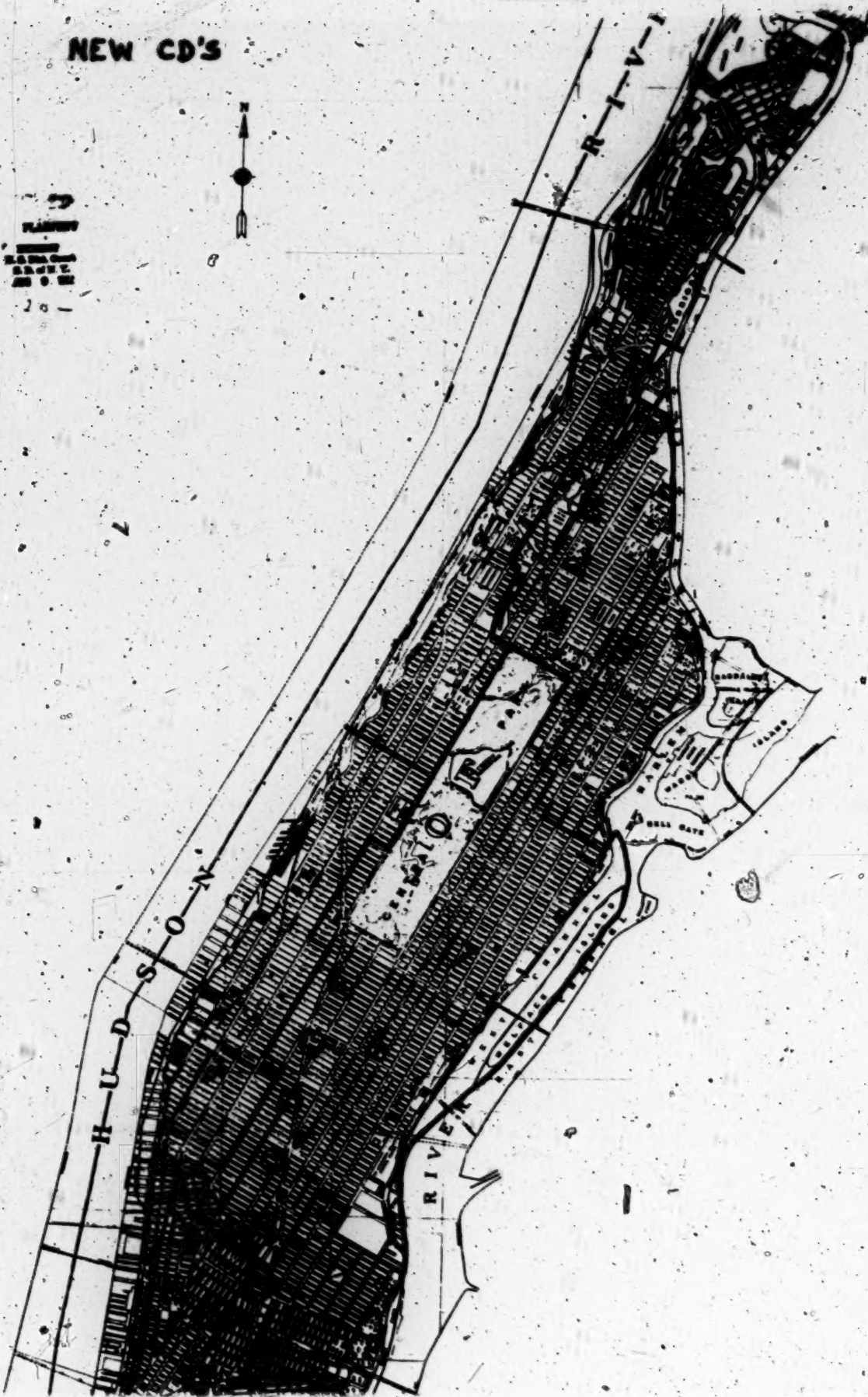
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JOHN H. HUGHES

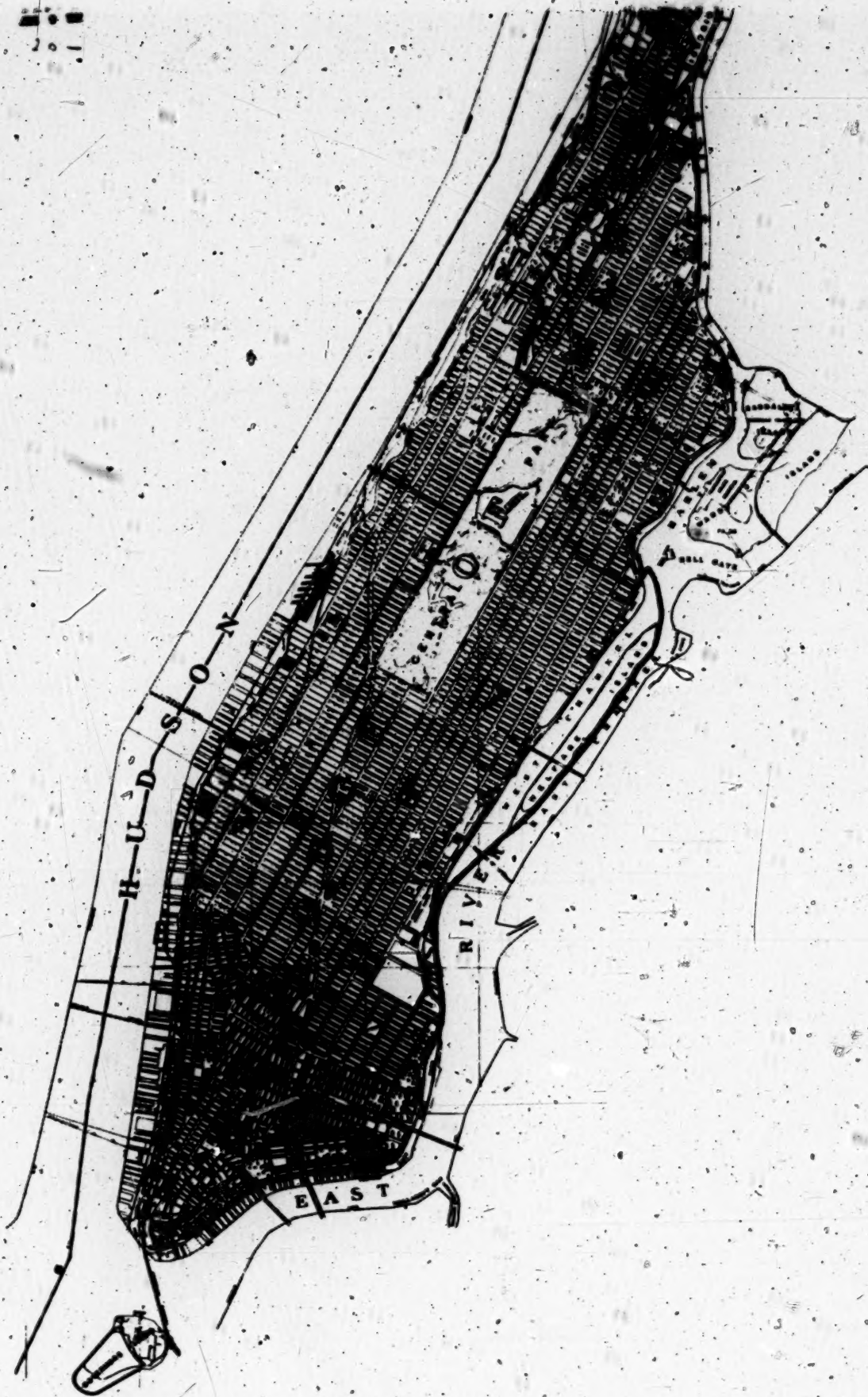
WILLIAM SADLER"

NEW CD'S

NEW
CD'S
20



Plain



Plaintiffs' Exhibit 2B

PLAINTIFFS' EXHIBIT 3

The following table, based upon the 1960 census figures, shows the population and racial and group composition of the four districts.

| District | Total Population | White* | | Non-White and Puerto Rican Origin** | |
|--------------|---------------------|------------------|---------------|--|---------------|
| | | Population | % of District | Population | % of District |
| 17th | 382,320 | 362,668 | 94.9% | 19,652 | 5.1% |
| 18th | 431,330 | 59,216 | 13.7% | 372,114 | 86.3% |
| 19th | 445,175 | 318,223 | 71.5% | 126,952 | 28.5% |
| 20th | 439,456 | 318,482 | 72.5% | 120,974 | 27.5% |
| TOTAL | 1,698,281 | 1,058,589 | 62.3% | 639,692 | 37.7% |

The following table shows the per cent of non-white persons and persons of Puerto Rican origin in each Congressional district in relation to the total number of such persons in the entire County:

| District | % of Non-White and Puerto Rican of County |
|------------|--|
| 17th | 3.1% |
| 18th | 58.2% |
| 19th | 19.8% |
| 20th | 18.9% |
| | 100.00% |

*Excluding persons of Puerto Rican origin.

**At present, the census figures for Puerto Ricans are available only on the basis of census tracts, some of which overlap Congressional District boundaries. The figures in the table tend to overstate the Puerto Rican population in the 17th district. The separate classification of non-white persons and persons of Puerto Rican origin derives from the census figures. See also N. Y. City Board of Education, *Toward Greater Opportunity* 155 (1960), classifying schools according to their percentage of Negro, Puerto Rican and other students. The breakdown between non-white and Puerto Rican origin by Congressional district is as follows:

| District | Non-White Population | Puerto Rican Origin Population |
|--------------------|-------------------------|--------------------------------------|
| 17th | 9,103 | 10,549 |
| 18th | 298,011 | 74,103 |
| 19th | 48,175 | 78,777 |
| 20th | 71,170 | 49,804 |
| TOTAL | 426,459 | 213,233 |

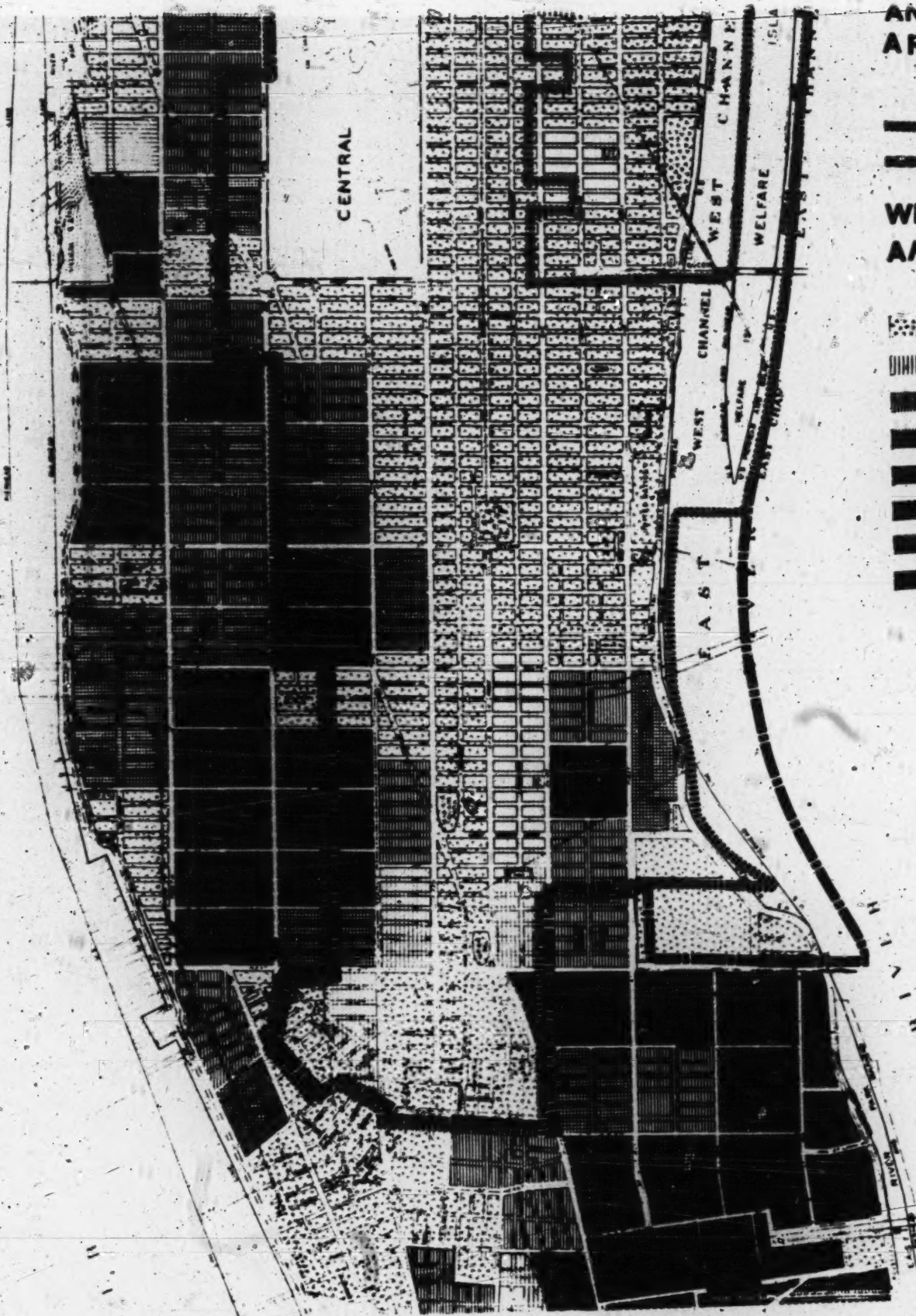


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AND BOUNDARY AREA STUDY

— OLD 17 TH
— NEW 17 TH

WHITE PUERTO RICAN
AND NON-WHITE
%



PROOF OF SERVICE

I, JEROME T. ORANS, one of the attorneys for Yvette M. Wright, Horacio L. Quinones, Darwin Bolden, Benny Cartagena, Ramon Diaz, Joseph R. Erazo, Blorneva Selby, Walsh McDermott and Seth Dubin, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of March, 1963, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On Nelson A. Rockefeller, Louis Lefkowitz and Caroline K. Simon, defendants herein, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Irving Galt, Esq., Assistant Solicitor General, 80 Centre Street, New York, New York.

2. On Denis J. Mahon, James M. Power, John R. Crews and Thomas Mallee, defendants herein, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Leo A. Larkin, Esq., Corporation Counsel of the City of New York, 1656 Municipal Building, New York, New York.

3. On Adam Clayton Powell, J. Raymond Jones, Lloyd E. Dickens, Hulan E. Jack, Mark Southall, and Antonio Mendez, defendant-intervenors herein, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, Jawn A. Sandifer, Esq., 271 West 125th Street, New York, New York, Robert W. Seavey, Esq., 405 Lexington Avenue, New York, New York; Morris Sterenbuch, Esq., 11 West 42nd Street, New York, New York; and William C. Chance, Esq., 225 Broadway, New York, New York.

.....
Jerome T. Orans
10 East 40th Street
New York 16, New York

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SUPREME COURT

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Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~22~~ 96

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, CAROLINE K. SIMON, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York,

Defendants-Appellees,

and

ADAM GLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Attorney pro se and for Appellees
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IRVING GALT
Assistant Solicitor General

SHELDON RAAB
Deputy Assistant Attorney General
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 950

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY, CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO,
BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all
individually and on behalf of all other persons similarly
situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the State
of New York, CAROLINE K. SIMON, Secretary of State of
the State of New York, and DENIS J. MAHON, JAMES M.
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sioners of Elections constituting the Board of Elections
of the City of New York,

Defendants-Appellees,

and

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO
MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Governor, Attorney General and Secretary of
State, pursuant to Rule 16 of the Revised Rules of the Su-

preme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statute Involved

Extracts from the challenged statute, Chapter 980 of the New York Laws of 1961, are set forth in Appendix B of appellants' jurisdictional statement. The statute in question, enacted on November 19, 1961, redistricted New York for the purpose of the 1962 Congressional elections. It was made necessary by the State's loss of two seats in the House of Representatives as a result of the 1960 decennial census. See 2 U.S.C. § 2(a).

Question Presented

Was the District Court required as a matter of law to find that New York's 17th Congressional district was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin", where the sole evidence supporting this charge is (1) that a smaller percentage of such citizens resided in the 17th district than in the other three congressional districts contained within New York County, (2) that the 17th district is the least populous of the four congressional districts in New York County, and (3) that the boundary of the 17th district does not consist of straight lines?

Statement of the Case

Appellants brought this action seeking a declaration that Chapter 980 of the New York State Laws of 1961 violates the Fourteenth and Fifteenth Amendments of the

Constitution of the United States and an order enjoining defendants from enforcing or executing that statute.* Appellants alleged that they are residents and voters in each of the four new congressional districts located in New York County (Complaint, par. 3). They claim that Chapter 980 "establishes irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin"; that the 17th Congressional district was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin and . . . is over-represented in comparison to the other three districts in the County of New York"; and that "the 18th, 19th and 20th Congressional Districts have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York and to be under-represented in relation to the 17th Congressional District" (par. 7). Finally, they charge that "the unconstitutional districting herein complained of has existed for many years" and that the Legislature "has redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perpetuate and aggravate the irrational, discriminatory and unequal districts and the segregation of voters by race and place of origin in the County of New York" (par. 8).

On July 31, 1962, the District Court convened a statutory three-judge Court to consider appellants' claims. This Court heard evidence on August 9th, 15th and 28th, 1962.

* Another action challenging this same statute (*Honeywood v. Rockefeller*, 62 Civ. 423, E.D.N.Y., Jan. 18, 1963) is now on appeal to this Court from a unanimous decision dismissing the complaint. The *Honeywood* case was previously before this Court when it affirmed the District Court's denial of a preliminary injunction. 371 U. S. 1 (1962).

At the opening of the trial, six district leaders of the Democratic party, including Congressman Adam Clayton Powell, intervened in the action and aligned themselves with appellees, denying that the redistricting statute was the product of racial discrimination and urging that appellants, if successful, would actually dilute the strength of the Negro and Puerto Rican vote in New York County.

According to appellants' figures (Jurisd. Statement, p. 2c), the four congressional districts which comprise New York County have a total population of 1,698,281, of whom 639,692 persons or 37.7% of the total, are non-whites or are of Puerto Rican origin. The 17th Congressional district contains 19,652 non-white persons and persons of Puerto Rican origin, or 5.1% of the total district population of 382,320. The 18th district contains 372,114 such persons, or 86.3% of the total district population of 431,330. The 19th district contains 126,952 non-whites and persons of Puerto Rican origin, or 28.5% of the total district population of 445,175. The 20th district contains 120,974 such persons, or 27.5% of the 439,456 persons who live in that district.

In addition to these figures, appellants showed (Transcript, pp. 142-48) that there would be other possible ways to divide New York County into Congressional districts which would tend to equalize the racial composition of each district. Appellants prepared three such hypothetical divisions which they contend were constructed "on a logical basis, using natural boundaries or well known streets and avenues" (Jurisd. Statement, p. 7). One of these, Plan "B", contained one district whose population was only 9.5% non-white or Puerto Rican and another district whose population was 59.1% non-white or Puerto Rican.

Under cross-examination, appellants' chief witness admitted that there were areas immediately adjacent to the 17th Congressional district which could have been included in that district to increase its total population without

altering the percentage of non-whites or Puerto Ricans residing there (Transcript, pp. 165-67).

Appellees Rockefeller, Lefkowitz and Simon offered no oral testimony, but rather presented documentary evidence to show that the boundary lines were not motivated by a discriminatory design. (Appellants' statement [Jurisd. Statement, p. 7] that appellees offered no evidence is clearly in error.) Highlighting appellees' evidence were (1) a certificate by the Bureau of the Census showing the composition of the old and new 17th districts, from which it clearly appeared that the new district created by the redistricting statute here challenged actually contains more non-whites and persons of Puerto Rican origin than did the old district (Exh. A), and (2) a series of maps of New York County Congressional districts tracing the gradual development of the present district lines through every redistricting statute since 1911 (Exhs. C through H).

Opinions Below

On November 26, 1962, the three-judge District Court dismissed the complaint. Each of the three judges wrote separate opinions.

Judge MOORE pointed out that appellants offered no proof "that the specific boundaries created by Chapter 980 were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts" (Jurisd. Statement, p. 4a). He noted that the redistricting was necessary due to the reduction in New York's congressional delegation from 43 to 41 representatives (p. 4a) and that New York County's proportional share of the state's total representation was four seats (p. 8a). New York's legislature adheres to the recommendation of the American Academy of Political Science that congressional district lines be based on an ideal of substantial equality of population, with

a maximum variation of 15% from average population per district (p. 7a). In light of this, Judge MOORE noted that the 17th district is less than 7% below the average population in the state and that appellants' reference to this district as "over-represented" is inaccurate (p. 9a).

Since there could be no legitimate claim that the districts were disparate in population, Judge MOORE concluded that appellants actually support a "racial percentage theory" (p. 11a)—claiming that the Constitution requires New York to divide its congressional districts so as to include the same ethnic ratios in each of the four districts in New York County—while the intervenors claimed that the adoption of such a theory would itself be violative of the Constitution. Noting that the Legislature redistricted New York County preserving the general pattern of past districting acts, and that there was no proof of any previous history of racial discrimination (pp. 15a, 16a) and pointing out that it is not unusual to find persons of the same race or place of origin settling together within a large city (p. 17a), Judge MOORE held that "to create districts based upon equal proportions of the various races inhabiting metropolitan areas would indeed be to indulge in practice verging upon the unconstitutional" (p. 17a) and voted to dismiss the complaint.

It should be noted that appellants have misconstrued Judge MOORE's opinion, attributing many theories to him which are not at all adopted by the opinion—in an effort to show why the District Court's finding of fact poses a substantial question worthy of review by the Court. First, they state (pp. 8, 13) that he "took the position that racially segregated voting districts are constitutional." This is completely inaccurate; in fact, Judge MOORE points out specifically that the question of discrimination "might well be raised" if the Legislature arbitrarily assigned population to districts on the basis of race (p. 16a). His opinion, of course, merely holds

that appellants failed to prove this. Second, they state that Judge MOORE held that segregated districts were constitutional if they benefit a particular minority and enable it to obtain representation (pp. 8, 13). This, too, is inaccurate. He merely pointed out (p. 17a) that it is not necessarily disadvantageous for a minority to be concentrated in several districts, and that it might be unconstitutional, therefore, to adopt appellants' theory that the Legislature should disregard neighborhood lines in order to disperse minority groups over a wide range of districts.

Judge FEINBERG concurred in the order dismissing the complaint on the ground that appellants did not meet their burden of proof (p. 17a). He stated that segregated districts would be unconstitutional (p. 18a), but held that inferences other than racial segregation "are equally or more justifiable" (p. 20a) from the evidence submitted by appellants and, therefore, that appellants had not sustained their burden of proof. First, Judge FEINBERG pointed out that the Legislature, in eliminating two districts from New York County to correspond with the census results, "had moved the lines in a rational manner", resulting in "straighter and apparently more logical congressional lines than before" (p. 21a). Nor did he find any proof that the lines were drawn in past years for discriminatory purposes (p. 22a). Second, Judge FEINBERG rejected appellants' contention that the 17th district was kept small in population so as to avoid incorporating a higher percentage of non-white or Puerto Ricans; noting that "a variation of only 7 per cent from average does not . . . justify a finding of racial discrimination" (p. 22a). Third, he disagreed with appellants' argument that the only available inference from the ethnic composition of the districts is one of a discriminatory legislative intent. The obvious inference, as he pointed out, is that non-whites and Puerto Ricans live in certain concentrated areas; indeed, under one of appellants' suggested plans, one district would have 9.5% non-white and Puerto Rican

population, while another would have 59.1% non-white and Puerto Rican (pp. 23a-24a). Failing proof of "failure to build upon prior lines in a rational, logical manner, a greater population disparity and an increase in boundary zig-zagging" (p. 24a), Judge FEINBERG held that appellants had not proved their case.

Judge MURPHY dissented, believing that this Court's decision in *Hernandez v. Texas*, 347 U. S. 475 (1954), required him to find that appellants proved a *prima facie* case even though he found "a total absence of direct proof of any specific intent by the New York Legislature" (p. 25a) and did not believe that mere showing of population disparity and non-straight boundary lines (p. 26a) would show such an intent. To him, the population figures alone amounted "to a mathematical demonstration that the legislation was solely concerned with segregating white, colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (p. 28a). He favored giving judgment for appellants declaring that the challenged portion of Chapter 980 is unconstitutional.

Argument

Appellants have sought to turn a purely factual determination—and a clearly correct one, at that—into a potpourri of legal problems that need to be resolved by this Court. They have misread the opinions below to create the impression that these opinions in some way uphold segregation and violations of Constitutional rights. In an effort to obtain review here, they have erected a legal theory—rejected by all three members of the District Court—which would itself trample on the Constitutional rights of minority groups. And, finally, they have taken the untenable position that it is the function of this Court to review *de novo* the findings of fact below.

We shall show that the findings below were clearly correct, and that the decision below in no way rests on any question even remotely deserving review here.

(A)

Since this appeal involves solely questions of fact, it is necessary at the outset to clear up two points advanced by appellants with respect to the scope of review on appeal and their burden of proof below. Perhaps in recognition of the insubstantiality of the questions they raise, appellants skillfully have rewoven the well-established principles which surround both these areas.

First, appellants argue (p. 10) that the finding of fact below—that the Legislature did not intend to segregate voters by race or origin—should be reviewed *de novo* here because the findings of fact and conclusions of law have been “intermingled”. They cite two cases that came up from the state courts in support of this proposition, completely ignoring the fact that *de novo* review is restricted to the rare situations where state courts deny constitutional rights under the guise of fact-finding. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, p. 200 (2d ed. Wolfson & Kaufland 1951). In any event, there is no “intermingling”; the entire decision, in fact, revolves about the issue of whether appellants have sustained their burden of proof. The scope of review here is obviously covered by the “clearly erroneous” test contained in Fed. R. Civ. P. 52(a). That standard, far from being inapplicable to direct appeals to this Court, as appellants suggest (p. 10), is especially pertinent here to relieve the Court of an undue burden on its resources. Cf. ROBERTSON & KIRKHAM, *supra*, at § 197:

Appellants also maintain (pp. 15-16) that the burden of proof immediately shifts upon a mere demonstration of the “effect” of the redistricting statute—that is, that

state officials have the burden of justifying any redistricting in which each district does not contain the same ethnic composition as every other district. As authority for their unique contention that the burden of proof shifts to us, appellants cite *Hernandez v. Texas*, 347 U. S. 475 (1954); *Norris v. Alabama*, 294 U. S. 587 (1935); and *Neal v. Delaware*, 103 U. S. 370 (1880). These cases are totally inapposite; they state the obvious proposition that the trier of fact can infer that there has been racial discrimination in selection of jury panels where members of a particular race, some of whom were shown to be qualified for jury service, were not called for jury service but consistently ignored over the course of several decades. Appellants' bizarre theory proves too much; under it, they would likewise succeed in making a *prima facie* case on the barest statistical showing in virtually every large city in the union. Surely there is no reason to suspect unconstitutionality from a commonplace. And commonplace statistics are all that were proved, as Judge FEINBERG's opinion points out in great detail. (As for appellants' cryptic statement that the state should bear the burden of rebutting legislative motive because it is in the "best position" to do so. [pp. 15-16], it is neither elaborated by them nor comprehended by us.)

Furthermore, appellants' conception of their greatly diminished burden of proof is really nothing more than a carbon copy of their theory that "effect" alone—not purpose—is the sole issue in this case (pp. 11, 14-15). It is to this contention—frivolous in the extreme—that we now turn.

(B)

As appellants themselves point out (p. 14), none of the three judges below accepted their theory that the "effect" of segregation—presumably anything less than substantial equality of ethnic composition among the districts—is sufficient to invalidate the redistricting statute. This theory, designed to mask their utter failure to prove their

reckless charges of legislative venality, is not only frivolous—if adopted, it would destroy the rights of minorities to equal treatment.

It is appellants, not the Court, who have adopted the theory of the "benign quota" (p. 13). It is they who would require the Legislature to single out minority groups and disperse them in equal numbers among the various Congressional districts. And—as intervenors-appellees' position dramatically illustrates—it is highly debatable whether appellants' proposed theory can be classified even as "benign". Unlike the familiar school segregation cases where "the central constitutional fact is the inadequacy of segregated education", *Branche v. Board of Education*, 204 F. Supp. 150, 153 (E.D.N.Y. 1962), no good can flow from the proposed theory; it is pure conjecture whether the minority will be helped or harmed if its strength is divided among all the districts in the county. Indeed, appellants' thesis might well be criticized as a deliberate attempt to dilute the voting power of minority groups. In any event, it can hardly be claimed that the State acts unconstitutionally when it refuses to follow so tenuous a theory.

(C)

There remains for discussion the sole issue which really determines this case—whether or not appellants sustained their burden of proof. We maintain—and the District Court found—that they failed to do so.

In their complaint, appellants rely upon three different avenues of proof to bolster their claim that the redistricting act is a device for racial and ethnic segregation. First, they rely upon the fact that the 17th Congressional district contains fewer non-whites and persons of Puerto Rican origin than the other three Districts in New York County. Second, they attempt to show that "the Legislature, in its effort to maintain the white, non-Puerto Rican character of the Seventeenth Congressional District,"

(par. 8) constituted it with a smaller population than the other three districts. Third, they allege that the Legislature "has redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perpetuate and aggravate . . . the segregation." *Ibid.*

Proof was solely lacking on all three points; we shall discuss each of them briefly.

1. *Ethnic composition.* The first avenue of approach was an elaborate attempt to show that fewer non-whites and persons of Puerto Rican origin resided in the Seventeenth Congressional district than in the other three districts. That fact is hardly startling; and it proves nothing. Unless appellants seriously press the contention that the Legislature must draw district lines so as to incorporate the same ethnic makeup in each district, the mere fact that the ethnic compositions of the districts vary is hardly the basis for a law suit. Appellants also attempted to show—by the most conjectural sort of proof—that district lines could be drawn which would somewhat close the disparity in ethnic composition that exists among the present New York County Congressional districts. Yet, they failed to show that the lines that they suggest rest upon any rational basis and, more important, that the lines which the New York Legislature drew rest upon no rational basis. Moreover, even these "hypothetical" districtings could not avoid the wide disparities which are created by the different compositions of different neighborhoods (Transcript, pp. 142-48). There are, obviously, a great many factors which a legislature takes and ought to take into account in drawing district lines. The economics of a neighborhood, its traditions, transportation, natural boundaries, the interplay of business and residential districts, the preservation of well-established district lines, and many other factors must be taken into account in any successful single-member district system. Appellants' burden

is to show that the redistricting statute "does not rest upon any reasonable basis, but is essentially arbitrary". *Morey v. Doud*, 354 U. S. 457, 464 (1957). See *Metropolitan Casualty Inc. Co. v. Brownell*, 294 U. S. 580, 584 (1935). But they presented not a shred of evidence to show that the New York Legislature did not follow these well-established rational criteria.

Nor does appellant's attempted reliance on *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), bolster their cause. *Gomillion* involved an attempt to alter the boundaries of a city in such a way as to remove all save four or five of its 400 Negro voters while not removing a single white voter or resident, thus depriving these voters of the benefits of residence in that city, including the right to vote in municipal elections. This, the Court noted, "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering" (364 U. S. at 341)—language borrowed by appellants in the instant case—and the Court went on to state that the allegations (taken as true, since *Gomillion* came up on a motion to dismiss) were "tantamount for all practical purposes to a mathematical demonstration that the legislation is solely concerned with segregating white and colored voters . . ." And, against the claim, the city authorities were unable to suggest any legitimate function for the redrawing of the municipal boundaries.

In this case we have the very opposite of the *Gomillion* situation. The justification for the redistricting is clear; New York lost two Congressional seats as a result of the 1960 census. The mathematics of the redistricting is not at all startling; in fact, as we have already pointed out, a large number of non-whites and persons of Puerto Rican origin were added to the 17th District and many white non-Puerto Rican areas are adjacent to the District but not included in it. Most important, appellants suggest no reason why anyone would prefer to exclude these voters from the 17th District only to include them in an adjoining

District. This is a far cry from the *Gomillion* situation, where the City authorities, by excluding Negro voters from the boundaries of Tuskegee, were able to disenfranchise them in municipal elections and deprive them of municipal services. In fact, it is impossible to make out any claim of disenfranchisement at all on the facts of the instant case.

Appellants' reliance on the lack of straight-line boundaries of the 17th District (p. 5) is similarly misplaced. As Judge FEINBERG pointed out (p. 21a), the redistricting actually straightened the district lines. Their ludicrous additional claim that the 17th District "was carved out of the center" of Manhattan Island (p. 5) is rebutted merely by looking at the maps contained in Appendix C to the Jurisdictional Statement. And appellants' final excursion into the neat world of straight lines—their contention that the area west of Stuyvesant Town was omitted in order to keep the 17th district composed of white non-Puerto Rican voters—is rebutted conclusively by the record. That area (Transcript, pp. 165-66) is overwhelmingly composed of such voters, and anyone seeking to increase their majority in the 17th district would have been delighted to include the area in the district.

2. *The Claim of "Over-Representation"*. The second avenue upon which appellants relied to establish an invidious legislative motive is their claim that the legislature constituted the 17th district with a smaller population than the other Congressional districts in New York County so that it would have the least possible number of non-whites and citizens of Puerto Rican origin. The claim of "over-representation" is frivolous in the extreme. The New York State Legislature, despite the absence of a Congressional standard (*Wood v. Broom*, 287 U. S. 1 [1932]), has adhered voluntarily to a maximum variation of 15% from average population per district, the variation recommended by the American Political Science Association and endorsed by former President Truman. N. Y.

Legislative Document No. 45 (1961); Hearings, Standards for Congressional Districts, H.R. Comm. on the Judiciary Sub-Comm. No. 2, 86th Cong. 1st Sess., pages 26, 29 (Serial No. 10, June 24 and Aug. 19, 1959). The four Congressional districts in New York County show an even smaller variation. The average population per district throughout the State is 409,326; the allegedly "over-represented" 17th District has 382,320 inhabitants—a variation of less than 7% from the average. The most heavily populated of the other districts, the 19th District, has 445,175 inhabitants—a variation of about 9% from average. The most stringent Congressional standard that has been proposed is a maximum 10% deviation from average; even this has been attacked by the most ardent advocates of population equality as being too stringent. *Hearings, supra*, page 20. Thus, the slight disparities in population among the New York County districts would pass muster under the sternest proposals yet made for Congressional action.

Moreover, there is no relation between the size of the 17th district and the charge of segregation. There are in fact large areas immediately adjacent to the new 17th Congressional District but not included within it with an extremely small percentage of non-whites and persons of Puerto Rican origin (Transcript, pp. 152-54, 165-67, 176-77). Indeed, there could be no more convincing proof that criteria other than race determine the shape of the New York County Congressional districts.

3. *Redrawing of Boundaries.* In a prime example of the recklessness which characterized their complaint, appellants alleged (par. 8) that the legislature "has redrawn the boundaries of [the] districts in accordance with shifts in non-white population and population of Puerto Rican origin." There is not one iota of evidence in the record to support this charge. In fact, as both Judge MOORE and Judge FEINBERG pointed out, the district lines were changed very little from the old lines, except for those

changes which obviously were made necessary by the loss of two Congressional seats in New York County. Indeed, the one change in the northern boundary of the 17th District—touching the most heavy concentration of non-whites and persons of Puerto Rican origin in New York County—was in the area which is completely occupied by a hospital (Transcript, pp. 149-50).

Appellants' three avenues of approach upon analysis prove to be three dead-end streets. They have succeeded in proving nothing at all.

CONCLUSION

This appeal presents no substantial question. The United State District Court correctly determined that appellants failed to prove the allegations of their complaint. Therefore, the judgment should be affirmed or the appeal dismissed.

Dated: New York, N. Y.,
April 22, 1962.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1962

YVETTE M. WRIGHT, HORACIO L. QUINONES,
DARWIN BOLDEN, BENNY CARTAGENA,
RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA
SELBY, WALSH McDERMOTT, SETH DUBIN,
all individually and on behalf of all other persons
similarly situated, *Plaintiffs-Appellants,*
—against—

NELSON A. ROCKEFELLER, Governor of the State
of New York, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York, CAROLINE K.
SIMON, Secretary of State of the State of New York,
and DENIS J. MAHON, JAMES M. POWER, JOHN
R. CREWS and THOMAS MALLEE, Commissioners
of Elections constituting the Board of Elections of the
City of New York, *Defendants-Appellees,*
—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES,
LLOYD E. DICKENS, HULAN E. JACK, MARK
SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN
BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R.
ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH
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similarly situated, *Plaintiffs-Appellants*,
—against—

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York, LOUIS J. LEFKOWITZ, Attorney General of the
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State of the State of New York, and DENIS J. MAHON,
JAMES M. POWER, JOHN R. CREWS and THOMAS MAL-
LEE, Commissioners of Election constituting the Board
of Elections of the City of New York,
Defendants-Appellees,
—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
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TONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellees' Motion to Dismiss or Affirm so greatly dis-
torts the facts, appellants' position, and the applicable law
as to necessitate this brief.* Because the motion does not
discuss questions two and four presented in the Jurisdic-

*The intervenors have apparently recognized the substantiality of
the questions presented by withholding opposition to this Court's
noting probable jurisdiction.

tional Statement, this brief will not further reemphasize appellants' belief in the substantiality of those questions.*

Appellants pleaded and proved in the court below that the challenged portion of Chapter 980 purposefully creates segregated voting districts.** As Judge Murphy found, the uncontradicted evidence adequately shows "a legislative intent to draw Congressional district lines in the 17th and 18th Districts on the basis of race and national origin" (J.S. 27a). Indeed, the purposeful segregation created by the statute is "patent." *Note*, 72 YALE L.J. 1041, 1061 (1963).

SUFFICIENCY OF THE EVIDENCE

All of the evidence in this case points to one central conclusion: It would be impossible to draw the district lines on Manhattan Island so as to create a single district with a higher percentage of white, non-Puerto Ricans (95%) and another single district with a higher reverse percentage (87%). The only reasonable inference, therefore, is that the legislative purpose was to create two segregated districts. If the statistical proof thus presented—all that was available in the absence of relevant legislative history—were finally held by this Court to be insufficient to prove purposeful discrimination, "states could with impunity draw legislative district lines on whatever bases they choose . . ." *Ibid*.

*Appellants believe this case must be considered by the Court separately from *Honeywood v. Rockefeller*, 62 Civ. 423, E. D. N. Y., Jan. 18, 1963. Although plaintiffs' first cause of action in *Honeywood* and the second question presented in their notice of appeal involve allegations somewhat similar to those in this case, the nature and quality of the proof submitted in *Honeywood* was vastly different, the two districts there challenged were created by separate portions of Chapter 980, and *Honeywood* involves primarily other issues not raised in this case.

**We have argued in the alternative, that a showing of purposefulness is not required. Jurisdictional Statement "(J.S.)" 14-15.

Specifically, appellants proved that the boundary between the 17th and 18th Districts fences a maximum number of non-whites and Puerto Ricans out of the 17th and into the 18th. Although a major crosstown artery, such as 96th or 110th Street, could have been made the boundary* (thereby tending to eliminate the population disparity between the two districts), the boundary is instead constructed like a staircase, cutting through several census tracts** in a way which places into the 18th that portion of each tract which contains the bulk of the non-whites and Puerto Ricans. And at virtually every one of the other places where the borders of the 17th "cut through" census tracts, the percentage of non-whites and Puerto Ricans placed outside the District is likewise significantly higher than the percentage left in the District. This disparity between the racial character of the population on either side of the 17th's borders is so characteristic of each of its 35 sides that the 17th could not be expanded to any appreciable degree in any direction without a significant increase in its percentage of non-white and Puerto Rican residents.***

*The boundary between the 19th and 20th Districts, 86th Street, is this kind of familiar dividing line.

**See J.S. 5, first footnote.

***Appellees urge that there are various areas which could have been included in the 17th without altering the percentage of non-whites and Puerto Ricans (pp. 4-5, 14, 15). However, the areas referred to are (i) a warehouse area on the lower west side which could have been added only by the most unseemly gerrymandering; (ii) an area on the upper East Side containing only about 10,000 persons, on which it was decided prior to the enactment of the statute to construct a public housing project of the type in which the average non-white and Puerto Rican occupancy is 73.4% in New York City (Pltfs.' Exh. 7); and (iii) an area west of Stuyvesant Town (R. 143-44, 155-66, Pltfs.' Exh. 4B), the exclusion of which supports appellants' position. It is more logically contiguous to the 17th than Stuyvesant Town and contains 12.2% non-whites and Puerto Ricans, a percentage 24 times as large as the comparable Stuyvesant Town percentage.

The evidence also showed that one area from the old 17th was placed into the new 18th—the area with the old 17th's highest percentage of non-whites and Puerto Ricans; that the new 17th received the two remaining areas on the Island with the largest white, non-Puerto Rican population, and that the virtually all-white 17th was kept 12%-15.4% smaller than the three adjoining districts.

As can be expected when a legislative majority uses criteria of race and place of origin in drawing a districting statute, the effect is to dilute the political power of the minority groups: non-whites and Puerto Ricans have been concentrated in a single district and eliminated as an effective political force in the other three. By contrast, in two of appellants' hypothetical plans, which were drawn without regard to race or place of origin,* there are three districts containing more than 30% non-whites and Puerto Ricans, and the other hypothetical results in two districts with more than 50% non-whites and Puerto Ricans.

Moreover, the political power of the minority groups is further diluted by the fact that almost 97% of the Island's non-whites and Puerto Ricans are placed in districts where their votes—because of the smaller relative population of the 17th—are 12%—15.4% less valuable than the votes of the 17th's inhabitants.

Appellees contend that these facts are "commonplace" (p. 10) because, like Judges Moore and Feinberg, they consider appellants' evidence bit by bit as separate "avenues of proof" (p. 11). In so doing they ignore both common sense and the settled practice in cases where the question is: On all the facts, are plaintiffs entitled to prevail? The requirement in such cases is not that the proof be "balkanized," but that the "totality of circumstances" be weighed. *Johnson v. Virginia*, 31 U. S. L. W. 3353 (April 29, 1963).

*Contrary to Appellees' assertion (p. 12), these hypotheticals were viewed by both Judges Feinberg (J. S. 23a) and Murphy (*Id* 31a) as embodying rational bases for establishing districts.

STANDARDS OF PROOF

As appellees' motion indicates (pp. 12-13), the Court below in effect required appellants to prove more than is legally required in a segregation case, and is inconsistent with *Gomillion v. Lightfoot*, 364 U. S. 339 (1960) and every other segregation case to have touched on the issue.* As the Court indicated in *Gomillion* (364 U. S. at 341), plaintiffs' burden is to show segregation of white and colored voters; the responsibility then shifts to the defendants to justify the legislation.

Appellees argue, however, that plaintiffs have the burden of proving that the statute does not rest upon any "reasonable basis," citing two cases in the economic regulation field, *Morey v. Doud*, 344 U. S. 457 (1957), and *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U. S. 580 (1935). That such cases are not relevant is underlined by the recent decision of this Court in *Ferguson v. Skrupa*, 31 U. S. L. W. 4376 (April 22, 1963). Segregation of persons on the basis of race or place of origin is the sort of "invidious discrimination" which offends the constitution *Ibid.* As Mr. Justice Holmes stated for the court in a case involving the right to vote in Congressional elections,

"States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right setup in this case." (*Nixon v. Herndon*, 273 U. S. 536, 541 (1937)).

Judge Feinberg's reference to appellants' "difficult burden" and his question: "would racial discrimination be 'the

*Although *Gomillion* was in this Court on a motion to dismiss prior to trial, the factual allegations in the affidavits submitted in support of that motion, which were accepted as true, were quite extensive. And this Court's ruling implied that, if proven at trial, those facts would sustain the plaintiffs' case.

only available inference' from these figures?" (J.S. 24a) illustrate the way in which the erroneous standard infected the lower court's decision. By putting his question as he did, instead of asking whether discrimination would be the *most probable* inference from appellants' proof, and by rejecting the sufficiency of that proof, Judge Feinberg's opinion in effect tells plaintiffs in segregation cases that as part of their affirmative case they must introduce evidence to rebut all other possible inferences.

In a case such as this, in which the legislative history has been purposely or inadvertently obscured, affirmative rebuttal of every other potentially "reasonable basis" or "available inference" would impose a staggering burden upon plaintiffs. Moreover, plaintiffs could still be faced for the first time on appeal with the contention that various other bases or inferences (such as those mentioned on page 12 of appellees' motion) could be deemed "reasonable" or "available" in the circumstances. In this type of case, once plaintiffs have made a *prima facie* case, the adversary system imposes upon defendants the obligation to come forward with any supposed justification that may exist. Any other rule leads not only to unfairness to plaintiffs, but also to the necessity for such beyond-the-record speculation as that in which Judge Feinberg felt compelled to engage (J.S. 17). As concluded by the *Yale Law Journal*,

"requiring a plaintiff to disprove all other permissible bases seems to impose on him the impossible task of rebutting all phantom bases on which a statute might have been drawn. Without requiring a state to introduce evidence tending to show some other explanation [than race] for the statute, a court could not generally determine whether other alleged bases are plausible." 72 YALE L.J. at 1059.

Appellees' motion also compounds the error of Judge Moore in the court below by considering as constitutionally

relevant the question whether the individuals subject to the statute were "helped or harmed" (p. 11). In so doing, appellees misconstrue appellants' argument by stating that it would require "dispersal" of minority groups. Appellants merely contend, of course, that statutes must be drawn wholly without regard to considerations of race or place of origin—that they must be completely "neutral" in so far as such facts are concerned.

The singling out of non-whites and Puerto Ricans for special treatment and jamming them into a separate district has much the same harmful effect as placing them in separate schools or requiring them to sit in separate seats in a courtroom *Johnson v. Virginia, supra*. Since Congressional districts are political subdivisions within which various public and private activities are organized, it is "no longer open to question" that a state may not constitutionally require their segregation. *Ibid*.

Moreover, harm must be presumed to flow from the use by a legislature of considerations of race or place of origin since a legislative majority will inevitably manipulate election districts to the detriment of a minority if permitted the unrestrained use of such considerations. The facts of this very case, re-emphasized at the outset of this brief and more fully discussed at 72 YALE L. J. at 1052-53, illustrate the evils. And a rule which permits use of racial criteria in New York would permit such use elsewhere. See *Gomillion v. Lightfoot, supra*.

Recognizing that they are on weak ground in regard to matters of proof, appellees attempt to mislead the Court into believing that they introduced significant evidence at the trial. In fact, the single table referred to in their motion (p. 5) did not "highlight" their evidence: it was the only item of proof they voluntarily offered.*

*The table, which did not even warrant comment in any of the opinions below, made the irrelevant point that the expanded 17th District contained a few more non-whites and Puerto Ricans than the old

SCOPE OF REVIEW

As a last resort, appellees try to convince this Court that the case should not be reviewed because the issues are purely factual (p. 8) and that this Court may not review the record de novo. They contend that:

"*de novo* review is restricted to the rare situations where state courts deny constitutional rights under the guise of fact-finding." (p. 9).

Nowhere do they indicate why this case is not one in which "fact-finding" has actually determined constitutional rights, or why *only* state court decisions of this type should be accorded *de novo* review.

And no such indications are possible. This case, without doubt, is one where the

"conclusion incorporates . . . criteria for judgment which in themselves are decisive of constitutional rights" *Watts v. Indiana*, 338 U. S. 49, 51 (1949).

Just as the *Watts* "factual" conclusion of no coerced confession would, if not reviewed and reversed by this Court, have established a constitutional standard permitting almost unrestrained extortion of confessions, so this case would permit unrestrained segregation of voting districts and other political units. In such a situation the general rule enunciated in *Niemetko v. Maryland*, 340 U. S. 268, 271 (1951) is applicable:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

17th District. However, as appellants showed, the percentage of non-whites and Puerto Ricans in the 17th District was reduced from 6.6% to only 5.1% (J.S. 7). The maps identified in the record as Defendants' Exhibits C through H were furnished in response to a specific demand for them by the presiding judge of the court below (J.S. 4a).

Rather than imposing an "undue burden" upon this Court, claimed denials of constitutional rights, "though cast in the form of determinations of fact, are the very issues to review which this Court sits." *Watts v. Indiana, supra*.

Finally, the fact that this case comes directly to this Court from a lower federal tribunal makes it an *a fortiori* case for the *de novo* review allowed by the above-cited state cases. Such cases have generally passed through three levels of appellate scrutiny in state courts whereas this case has not been reviewed by any appellate tribunal. Moreover, this Court should be less reluctant to review the record of a Federal court than of a state court, since the latter might be accorded additional deference due to considerations of Federalism.

CONCLUSION

The Motion to Dismiss or Affirm should be denied and this Court should note probable jurisdiction.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1963

No. 96

YVETTE M. WRIGHT, HORACIO L. QUINONES,
DARWIN BOLDEN, BENNY CARTAGENA, RAMON
DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY,
WALSH McDERMOTT, SETH DUBIN, all individu-
ally and on behalf of all other persons similarly situ-
ated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of
New York, LOUIS J. LEFKOWITZ, Attorney General
of the State of New York, CAROLINE K. SIMON, Sec-
retary of State of the State of New York, and DENIS J.
MAHON, JAMES M. POWER, JOHN R. CREWS and
THOMAS MALLEE, Commissioners of Elections con-
stituting the Board of Elections of the City of New
York,

Defendants-Appellees,

and

ADAM CLAYTON POWELL, J. RAYMOND JONES,
LLOYD E. DICKENS, HULAN E. JACK, MARK
SOUTHALL and ANTONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANTS-INTERVENORS-
APPELLEES**

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IN THE
Supreme Court of the United States

October Term, 1963

No. 96

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN,
BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLOR-
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vidually and on behalf of all other persons similarly
situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the State
of New York, CAROLINE K. SIMON, Secretary of State of
the State of New York, and DENIS J. MAHON, JAMES M.
POWER, JOHN R. CREWS and THOMAS MALLEE, Commission-
ers of Elections constituting the Board of Elections of
the City of New York,

Defendants-Appellees,

and

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHWALL and ANTONIO
MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANTS-INTERVENORS-
APPELLEES**

Statement

This civil action was brought under the Civil Rights
Act, 42 U. S. C., Sections 1983, 1988, 28 U. S. C., 1343, to
redress an alleged deprivation of plaintiffs' Federal con-
stitutional rights purportedly arising under the 14th and
15th Amendments of the Constitution of the United States.

The complaint is directed against what appellants conceive to be a "distinct and separate portion of Chapter 980 of the 1961 laws of New York State" (par. 5.complaint) (R. 3). The particular paragraphs of said statute which are challenged describe the boundaries of the 4 Congressional districts in the County of New York, which Congressional districts are known as the 17th, 18th, 19th and 20th Congressional districts of the State of New York. The complaint alleges that that portion of the aforesaid Chapter 980 which creates the boundary of the 17th through 20th districts of New York establishes irrational, discriminatory and unequal Congressional districts in the County of New York and segregates eligible voters by race and place of origin (R. 3).

The complaint seeks, *inter alia*, the following relief:

(a) A declaratory judgment declaring that the portion of the aforesaid Chapter 980 which describes the boundaries of the 17th through 20th Congressional districts is violative of the 14th and 15th Amendments to the Constitution of the United States (R. 7);

(b) That a preliminary injunction and permanent injunction be entered restraining the defendants from conducting the primary and general elections scheduled for September 6, 1962 and November 6, 1962 respectively, in New York County on the basis of the Congressional district boundaries in said County as described in Chapter 980 (R. 7);

(c) That the Court decree that, unless there is enacted into law a valid redistricting of the Congressional districts a reasonable time prior to September 6, 1962, that the primary and general elections in the said districts be held at large in the County of New York;

(d) That the Court decree that, unless there is enacted into law a reasonable time prior to September 6, 1962 a

valid redistricting of the Congressional districts in question, that a special master be appointed to constitutionally redefine the boundaries of those districts (R. 8).

The Issues

Assuming, arguendo, only that appellants stated a cause of action in the trial below, a perusal of the complaint demonstrates that the success of their action was inextricably linked, *inter alia*, to their ability to prove the following:

(1) That the boundary lines created by Chapter 980 were . . . irrational, discriminatory and unequal; "and

(2) "Segregates eligible voters by race and place of origin" (Par. 7 of complaint) (R. 6).

The main thrust of the appellants' case as construed in light of the evidence adduced at the trial was directed toward having declared unconstitutional that portion of Chapter 980 (which plaintiffs have erroneously assumed to be severable) establishing the 17th through 20th Congressional districts because such lines involve segregation based on racial lines. Little, if any, of the evidence adduced by plaintiffs at the trial was directed toward showing disparity in the voting power of persons in the various Congressional districts involved.

Small wonder—because, had the appellants attempted to stress only the disparity theory without having it linked to a purported racial question they would obviously have run squarely into the holdings in *Wood v. Broom*, 287 U. S. 1, 53 S. Ct. 1, and *Colgrove v. Green*, 328 U. S. 549, 66 S. Ct. 1198. The slight disparity involved would, it is submitted, have presented, on the face of the complaint, no basis for relief as well as a serious question as to the justifiability of the matter.

4

Discussion of disparity, if any, of the voting power will then be limited in this brief in light of the above and in reliance on the rationale of the Statutory Court in the case of *WMCA v. Simon*, 370 U. S. 190.

We thus choose to squarely face the main factual question as to whether appellants have shown that the redrafting of the lines forming the Congressional districts in question was done along racial lines so as to segregate the appellants (or some of them—in that two of the appellants live within the 17th Congressional district), out of the 17th (R. 187-194) Congressional district and to unconstitutionally dilute their voting power solely because of their race or place of origin.

Although it is the position of the intervenors that this case could have been decided on its facts, i.e., that there had been no racial gerrymandering in the Congressional districts in question, the intervenors do not concede any of the other Constitutional questions which necessarily arise from the allegations of the complaint (as distinguished from those facts actually demonstrated at the trial).

The appellants called only two witnesses, Mr. Domingo Clemente and Mr. Edward Limoges. The testimony of these two witnesses taken together primarily shows the following:

1. That the Island of Manhattan is divided into four Congressional districts with populations in each of the districts running from a low of 382,320 (17th district) to a high of 445,175 (19th district) (R. 40-44). Such evidence shows a disparity, we believe, of no more than 14.2% and not 15.4%, as alleged in Paragraph 8 of the complaint (R. 6-7).

2. That the lines which establish the 17th Congressional district are drawn so as to show:

(a) In one instance (98th Street and Park Avenue) a census tract which has less than 10% Puerto Rican and non-white population, was cut so as to leave approximately 45% of said non-white population without the district and 55% within the district (R. 52). Most of the blocks of said census tract are included within the 17th Congressional district (R. 53). Such was the case in the old 17th Congressional district (see Exhibits 2A-2C, 4B) (R. 195, 199, 202);

(b) In one instance (Park Avenue, 91st Street to 98th Street) a census tract having a population of 17% Puerto Rican and non-white was cut and that included within the said 17th district was only four blocks of a fourteen block census tract which only contained 13.3% of the population of said tract (i.e., 3,056 persons of 10,377 persons living in the entire census tract) and that of this 13.3%, 455 persons were non-white (R. 64-65);

(c) That an area in the northeast corner of the 17th district (north of 88th Street and east of 3rd Avenue) containing 10,507 persons of which less than 5% were Puerto Rican and non-white (i.e., the district was at least 95% white) was not included within the new 17th Congressional district (R. 65) (R. 69);

(d) That in the southeast corner of the 17th Congressional district an area known as Stuyvesant Town and which contained less than 5% Puerto Rican and non-white was added to the 17th Congressional district, excepting that a strip of this area (at least 95% white) along 1st Avenue between 14th and 19th Streets was excluded (R. 69) (see Exhibits 2A-2C, 4B);

(e) That an area adjacent to Stuyvesant Town (bounded by 14th Street, 1st Avenue, 19th Street

and 3rd Avenue) which contained a population of only 12.2% Puerto Rican and non-white was not taken into the district. This area contained 6,862 persons of which only 837 were Puerto Rican and non-white (R. 99);

(f) That a triangular shaped area bounded by 4th Avenue, 14th Street and Third Avenue, containing a population having between 35% and 50% Puerto Rican and non-white was allowed to remain within the new 17th district (Exhibits 2A-2C, 4B);

(g) That a census tract running from East 4th Street to East Houston Street was cut by the Congressional line running along Great Jones Street so as to have a population derived from said tract consisting of 8.2% of Puerto Rican and non-whites within the 17th district and 12.6% without the 17th. The bulk of the land mass of the tract is outside the 17th. Such was the case with respect to the old 17th (R. 69);

(h) That the southerly border of the 17th Congressional district cuts through an area (from West Broadway to Bank Street), which is less than 5% Puerto Rican and non-whites. The area immediately to the south of the said southerly border line of the 17th Congressional district is comparatively large and contains less than 5% Puerto Rican and non-white and could have been added to the 17th Congressional district (R. 69), Exhibits 2A-2C, 4B; :

(i) That the westerly border of the new 17th Congressional district is the same as theretofore existing and it cuts through various census tracts having Puerto Rican and non-white populations ranging from less than 5% to 50-75% (R. 70). In the tract in which there is a Puerto Rican and non-white population of 50-75% (West 26th to West 30th

Streets), the census tract is cut so as to allow a partial tract with a population of 71.2% inside the 17th and the balance of the tract with 48.7% outside the 17th. In absolute numbers, however, more Puerto Rican and non-whites are in the portion of the tract outside the 17th Congressional district (R. 70).

Other census tracts are cut with various percentages and absolute numbers of Puerto Rican and non-white persons inside and outside the 17th Congressional district.

3. That there are numerous ways in which more Puerto Rican and non-white persons could have been added to the district (R. 99-100) (Exhibits 2A-2C, 4B).

4. That there are also numerous ways in which more white persons could have been added to the district without materially increasing the number of Puerto Rican and non-white persons in the district (R. 100).

No evidence was submitted on the number of persons: (a) who were registered to vote and, (b) who actually voted within the census tracts in the 17th or in the districts or tracts nearby, although suggestions to this effect were made by Mr. Justice Moore during the course of the trial (R. 44-45).

Nor was evidence introduced concerning the manner (i.e., Democratic, Republican, Liberal, etc.) in which various census tracts or election districts voted in previous elections. Nor was any evidence adduced showing the economic structure, or the type of buildings or communities (business, residential, manufacturing, etc.), included within the 17th Congressional district. But, rather plaintiffs proceeded without any evidence on such matters with polarized view that the enlargements of the Congressional districts must have been accomplished solely on a racial basis.

That none of the foregoing probabilities which may have shown a rational basis (although perhaps a purely political one), on which the legislature may have acted with reference to enlarging the lines of the Congressional districts in question, was excluded by the evidence of the appellants. That the appellants were required by their evidence to exclude such reasonable possibilities is set forth in *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78, 79, 31 S. Ct. 337, 340 (1911). The appellants approach disregards the conclusive presumption that a legislature acts with full knowledge and in good faith, *U. S. v. Des Moines Nav. & Ry. Company*, 142 U. S. 510, 544, 12 S. Ct. 308, 317 (1892).

Summary of Argument

The striking down of a State statute is a most serious matter under any circumstances and, it is submitted, should be particularly avoided when no challenge of a State statute has been made for a long period of years. In the instant matter the 17th Congressional district as now defined by Chapter 980 with respect to almost all of its borders, has been substantially the same for a period of ten years. Chapter 980 merely added certain areas in the southeasterly section of the 17th Congressional district which were immediately contiguous with the former 17th Congressional district and also certain areas in the northeast portion of the district which were immediately contiguous with the former easterly and northeasterly boundary of the former 17th Congressional district. During the many years that the 17th Congressional district has been defined as it basically is now, no one attacked or challenged the constitutionality of said district on any grounds. The addition of the new areas to the former 17th Congressional district was not shown on the trial by any stretch of the evidence or of the imagination, to deprive any person or group of persons of their vote—for any reason whatsoever—much less because of their race or color.

If the appellants had viewed Chapter 980 in its entirety, instead of from the narrow polarized view they choose to take, they would have found that as compared to other Congressional districts in the State the 17th to 20th Congressional districts stand about in the median with respect to the voting power of the individuals living within the districts. The choice of the appellants in choosing, and limiting their case, to only the four Congressional districts on the Island of Manhattan fails to recognize that Chapter 980 is an integrated body of law setting up 41 Congressional districts—one interdependent upon the other. There is no severability clause in said chapter—and one cannot say that it was the intention of the legislature to make districts which could be microscopically examined on their own—without reference to the entire body of New York State Congressional districts.

The appellants have also failed to realize that there must be dividing lines somewhere if we are to have Congressmen elected on a district basis as distinguished from a state-wide basis. That these lines were drawn in some instances through census tracts which contain Puerto Rican and non-white persons in varying percentages, cannot be made to spell out a singling out of any race or group of persons so as to either disenfranchise such persons or to dilute their vote.

The mathematical permutations and combinations possible from the factors of—the size of cut census tract portions included in or out of the 17th, absolute numbers and percentages of Puerto Rican and non-white persons included in or out of the 17th, and the race makeup of various census tract districts contiguous with but excluded from the 17th—are infinite so that the appellants, defendants, intervenors, the Court or anyone else can mold them into demonstrating anything one should desire and could be made to give a certain degree of comfort to all persons who should desire to utilize such an Alice-in-Wonderland tech-

nique. Those inclined to such a purely mathematical and intriguing approach would find their task geometrically increased by adding the variable factors produced by the voting strength of the population of the 37 districts comprising the balance of New York's 41 Congressional districts.

Throughout the entire trial below appellants failed to recognize that the great bulk of persons excluded from the 17th district and living on the Island of Manhattan (if we are to limit our argument only to the Island of Manhattan) are white rather than Puerto Rican and non-white. If any vote has been diluted it has applied as much to white persons as to Puerto Rican and non-white. Thus it is obvious that there has been no singling out of any race or group of persons for a dilution of vote—but if there is a dilution of vote in the Manhattan Congressional districts other than the 17th, such dilution equally affects all persons, white and non-white alike, living without said 17th district.

That a small disparity in the size and voting power of any Congressional district (and again we run into the problem of the failure of the appellants to compare the four Manhattan districts with the voting power of the other 37 districts within New York State), would, if it is submitted, be a question particularly for the legislatures of the United States and the State of New York and would not be the type of political question with which the Court should exercise its equitable powers. Cf. *Wood v. Broom*, 287 U. S. 1, 53 S. Ct. 1 and *Colgrove v. Green*, 328 U. S. 549, 66 S. Ct. 1198.

It would appear that the racial allegations made in the complaint were made with a view towards taking the factual situation here out of the ambit of the *Broom* and *Colgrove* cases, *supra*, and placing them in the entirely different background and factual pattern of the unique

situation existing in *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). That the factual pattern of *Gomillion v. Lightfoot* is so unlike the factual case presented here will be discussed hereinafter—and, of course, may readily be seen from the reports of the case. (See also Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, S. Ct. Rev. 194 (1961).)

The appellants' attempt at demonstrating that there are less Negroes on an absolute basis as well as on a percentage basis in the 17th Congressional district than in the other three Manhattan districts, does not make out a violation of the Constitution. And this, if for no other reason that the failure of appellants to recognize that the Constitution prohibits segregation but it does not require that the legislature take action to mathematically adjust all existing racial imbalance and to affirmatively integrate Congressional districts.

It is pointed out also that except for the complete disfranchisement of the Negroes in *Gomillion*, as well as their being cut off from all of the general functions and the service functions of that municipality, all of the cases relied on by the appellants deal with the deliberate segregation of persons from the use of facilities such as schools, swimming pools, buses, etc. Such cases do not involve the problem of the readjustment of Congressional district lines so as to include persons into one Congressional district and to cut them out of another where they are now enjoying the identical franchise with respect to voting. Moreover, it must be taken to be appellants' position that such readjustment must necessarily be done on a racial basis—that is, either the Legislature or the Court (according to the appellants) must single out Puerto Rican and non-white persons and move them into the 17th Congressional district—and sever their existing voting affiliations.

ARGUMENT

POINT I

The appellants failed to adduce evidence showing that they (or persons similarly situated) have either been deprived of their vote, or have had their voting power materially diluted solely because of their race or place of origin.

The appellants on the trial of this action attempted to remove their case from the general ambit of the political arena and placed into the sphere created and inhabited only by *Gomillion v. Lightfoot*, 364 U. S. 339 (1960) because of *Gomillion's* unique factual pattern.

In their haste to wedge the facts of this case into the exceptional situation existing in the *Gomillion* case, appellants deliberately or otherwise failed to adduce evidence on the disparity of voting powers between the four Congressional districts in issue and New York's other 37 districts. They likewise have failed to show what the racial composition of the other 37 districts were, whether the Negroes living in those districts have diluted votes or enhanced votes with respect to the four Congressional districts in Manhattan.

The Supreme Court in *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78, 79, 31 S. Ct. 337, 340 (1911) stated certain basic propositions which are equally applicable to the instant case:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court are these: (1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify . . . but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is

purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

The appellants in attacking the constitutionality of the Congressional district lines as drawn failed to show that such lines do not rest upon a rational basis other than race or color. In particular, the appellants failed to exclude the possibility that the lines were drawn on a historical basis, a political basis (i.e., Democrat and Republican voting records), an economic basis or on other possible reasonable bases which cause the division of other Congressional districts.

The appellants' reliance upon *Gomillion v. Lightfoot*, *supra*, is, we will show, misplaced and particularly, the appellants have failed to heed the admonition found in *Gomillion v. Lightfoot* (at p. 344) to the effect that:

"Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them must not be applied out of context in disregard of variant controlling facts."

Gomillion:

(1) *Gomillion* was one of the battles in the racial conflict for political control of Macon County and the City of Tuskegee was redistricted for no other reason than to exclude Negroes from the city. See *Lucas, supra*. There

was not in *Gomillion* any Federal compulsion to create new district lines so as to reduce the number of Congressional districts, as in the instant case, from six to four.

(2) Of the 1,000 voters (600 white, and 400 Negro) within the City of Tuskegee prior to its redistricting, it was alleged that only four or five of its Negro voters remained afterwards—not one single white voter or resident was removed by the redistricting (p. 341).

(3) The redistricting in *Gomillion* not only wholly and completely disenfranchised the Negro voters from their theretofore right to vote in the City of Tuskegee but even as importantly such redistricting would have deprived the Negroes from the general municipal functions and municipal services which had theretofore been supplied to them by the City of Tuskegee. (*Gomillion v. Lightfoot*; *supra*, at p. 347), and (*Lucas, supra*, at p. 239 *et seq.*) In the instant case, as distinguished from *Gomillion*, if anyone was hurt by the drafting of the new lines of the 17th Congressional district, at least as many whites as Puerto Rican and non-whites were injured.

There is no constitutional right for any person to be in any particular Congressional district. The voting rights and all other privileges on one side of the Congressional district lines involved here are in the very nature of things basically equal to the rights on the other side of any Congressional district line. Of course, nothing of this nature could be said about *Gomillion v. Lightfoot*.

It is also to be noted that the motives existing in the fencing out of the Negroes from Tuskegee, Alabama, do not and could not exist here. The fencing out of a Negro from Tuskegee, Alabama, would have, in the circumstances of the racial situation existing in that city, resulted in a complete deprivation of the Negro from all the services, pleasures and facilities the City of Tuskegee offered. This cannot and does not exist on the Island of Manhattan. It

could make no difference to the citizens of the four Congressional districts involved where a theoretical line is drawn with respect to their Congressional district. Persons on both sides of the line have exactly co-equal rights to all the facilities, services and pleasures that may exist in any of the other Congressional districts. Although, motive is not always of great relevance, it does in certain situations spell out and lend color and light to a factual pattern. Any possible motive to exclude Negroes and Puerto Ricans from any Congressional district solely because of their race or color, would not exist in Manhattan's Congressional district picture because the use or non-use of facilities is not and could not be involved, as it was in the *Gomillion* case. Thus, by an absolute removal of improper motive an inference can be drawn that the unconstitutional act complained of did not take place.

Therefore, on the basis of the factual situation, it is urged that this Court affirm the judgment of the Court below.

POINT II

The facts here, having no similarity to those in *Gomillion v. Lightfoot*, *supra*, the Court below was correct in refusing to exercise equity powers because there is neither such a clear case of segregation or invidious discrimination as would warrant the Court in entering this particular political thicket.

Historically—and nothing contained in *Baker v. Carr*, 382 U. S. 391 alters the same—the Courts have refused to exercise their equity powers in matters which do not involve clear cases of violations of Constitutional rights. *South v. Peters*, 339 U. S. 276, 70 S. Ct. 641 and cases therein cited.

The Court should consider, as did Mr. Justice Rutledge in his concurring opinion in *Colgrove v. Green*, *supra*, the

untimeliness from a pragmatic point of view of the commencement of this lawsuit.

At the time this action was commenced primary elections were scheduled for September 6, 1962—the general election was scheduled for November 6, 1962. The complaint was dated July 25, 1962 and presumably was served on the same day or soon thereafter. The first hearing on the matter was held on August 9, 1962—just four weeks before the date set for the primary election. The relief requested would have the Court reject the judgment and discretion of the State Legislature and substitute judicial conjecture as to new racially balanced Congressional districts.

It is to be noted also, that a striking down of the district lines in question would have required Congressmen to run at large in New York State and not just on a county-wide basis (2 U. S. C. A. 2a(c)(4)). Appellants at this late date have attempted to open a Pandora's box which would require a complete overhauling of the State's electoral process. Cf. Mr. Justice Douglas' dissenting opinion in *South v. Peters, supra*.

At the very best, the facts upon which the alleged unconstitutionality exists are not clear and we submit that no objective person could find that there was in existence such heavy, invidious and great discrimination so that if the Court did not step in, great constitutional deprivations would remain uncorrected. At the very best (and we believe the facts do not so show) this case is in the penumbra of a racial situation—but much more clearly so, it is a political thicket—and one which, under the circumstances here presented, it is submitted, should be left untouched by the Court.

If the facts here show anything they demonstrate only a racial imbalance, created over the years by unbalanced population shifts into the various areas of Manhattan by persons of white, Puerto Rican and others and non-white persons.

There is nothing in any of the constitutional provisions or cases cited by the appellants which shows that a mere racial imbalance of Congressional districts is *ipso facto* violative of the Constitution of the United States. There is nothing inherently unequal about Congressional districts. *Cf. Brown v. Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686. The Constitution, we submit, prohibits segregation but does not necessarily require affirmative action with respect to racially integrating Congressional districts.

The facts, even when interpreted in a light most favorable to appellants show no significant racial discrepancies and at the very most, there is only a *de minimus* disparity in voting power between the districts.

There can be no question but that the facts of this case did not show such a magnitude and frequency of constitutional aberration as would have warranted the Court in exercising its equitable powers.

The relief prayed for would require a direction which might bring even greater disparity of voting right than that complained of and which might deprive all citizens, possibly on a state-wide basis, of representation by districts which the prevailing policy of Congress commands. (2 U. S. C. A. Sec. 2a(c), *cf. Colgrove v. Green*, *supra*.)

POINT III

The factual situation presented raises no questions under the 14th or 15th Amendments of the Constitution of the United States.

Because of the views taken in Points I and II above, it is the position of the intervenors that neither the question of equal protection under the 14th Amendment or the question of abridgement of voting rights on account of race or color under the 15th Amendment, is factually raised here.

CONCLUSION

Wherefore, for reasons herein above stated, the judgment below should be affirmed.

Respectfully submitted,

JAWN A. SANDIFER,
*Attorney for Defendants-Intervenors-
Appellees.*

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IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES,
DARWIN BOLDEN, BENNY CARTAGENA,
RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA
SELBY, WALSH McDERMOTT, SETH DUBIN,
all individually and on behalf of all other persons
similarly situated, *Plaintiffs-Appellants,*

—against—

NELSON A. ROCKEFELLER, Governor of the State
of New York, LOUIS. J. LEFKOWITZ, Attorney
General of the State of New York, CAROLINE K.
SIMON, Secretary of State of the State of New York,
and DENIS J. MAHON, JAMES M. POWER, JOHN
R. CREWS and THOMAS MALLEE, Commissioners
of Election constituting the Board of Elections of the
City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES,
LLOYD E. DICKENS, HULAN E. JACK, MARK
SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 96

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN
BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R.
ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH
DUBIN, all individually and on behalf of all other persons
similarly situated, *Plaintiffs-Appellants,*

—against—

NELSON A. ROCKEFELLER, Governor of the State of New
York, LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, CAROLINE K. SIMON, Secretary of
State of the State of New York, and DENIS J. MAHON,
JAMES M. POWER, JOHN R. CREWS and THOMAS MAL-
LEE, Commissioners of Election constituting the Board
of Elections of the City of New York,

Defendants-Appellees,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and AN-
TONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Opinions Below

The three separate opinions of the three-judge District
Court (R. 150-177) are reported at 211 F. Supp. 460.

Jurisdiction

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. On November 26, 1962 the Court entered a judgment dismissing the complaint (R. 178). A Notice of Appeal was filed in the District Court on January 23, 1963 (R. 179-180). Jurisdiction of this Court to review the judgment below is conferred by 28 U. S. C. § 1253. This Court noted probable jurisdiction (R. 244).

Questions Presented

1. Whether appellants sustained their burden of proving that the portion of Chapter 980 of the 1961 Laws of the State of New York which delineates the boundaries of the Congressional districts in Manhattan Island segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment.
2. Whether a statute which segregates persons by race or place of origin may be declared constitutional on the ground (a) that no proof of specific harm to the individuals subject to the statute, other than the segregation, has been adduced at trial or (b) that the segregation is benign in its effect.
3. Whether plaintiffs attacking the constitutionality of a state statute must, in addition to proving that the statute has the demonstrable effect of segregating persons by race or place of origin, also prove that the "motive" of the legislature was to produce that effect.
4. Assuming, *arguendo*, that both effect and motive must be shown (a) whether plaintiffs, in the absence of

proof by defendants, must affirmatively prove that a legislative motive to segregate is the "only available inference", and (b) whether a court may sustain the constitutionality of the statute by inferring an alternative legislative motive regarding which there is no evidence in the record and which is not a proper subject of judicial notice.

Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are the Fourteenth and Fifteenth amendments to the United States Constitution, 2 U. S. C. § 2(a), 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. §§ 1343, 2201, 2202 and 2281, and Chapter 980 of the 1961 Laws of New York. Their pertinent provisions are set forth in Appendix B to the Jurisdictional Statement.

Statement

Proceedings Below

On November 9, 1961, the Joint Legislative Committee on Reapportionment recommended to an extraordinary session of the New York State Legislature a statute redrawing the boundaries of the Congressional districts of the state in accordance with the 1960 Federal census, as required by 2 U. S. C. § 2(a), N. Y. Leg. Doc. No. 45 (1961), set forth in Appendix B to the Jurisdictional Statement. No hearings were held and no debates recorded, and the statute was passed without change and signed by the Governor on the next day. N. Y. Sess. Laws, Extraordinary Sess. 1961, c. 980 §§ 110-12.

On July 26, 1962, appellants filed a civil complaint pursuant to the Civil Rights Act, 42 U. S. C. §§ 1983 and 1988, 28 U. S. C. § 1343, in which they challenged that portion of

the statute which delineates the boundaries of the four Congressional districts which are wholly contained, and comprise all of the districts, in New York County (the Island or Borough of Manhattan). Appellants are residents and registered voters in each of these four districts. The appellees named in the complaint are various state and city officials charged with the administration of the statute. The complaint alleges that the challenged portion of the statute segregates eligible voters in Manhattan on the basis of race and place of origin in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment. The complaint seeks a judgment pursuant to 28 U. S. C. § 2201 declaring the challenged portion of the statute unconstitutional and restraining the defendants in the enforcement thereof and, in the event such declaration does not lead to corrective legislation, additional equitable relief.

On motion of appellants and after hearing, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284 (R. 21-22).

At the opening of the trial before the three-judge court, Adam Clayton Powell, the then incumbent Congressman from one of the pre-1961 Congressional districts, and five other individuals, alleging *inter alia* that "Negroes and Puerto Ricans now control" the new 18th Congressional District in Manhattan, which they alleged had "retained heavily its Negro and Puerto Rican character under the present redistricting," were permitted to intervene as defendants (R. 14-18).

Appellants' evidence at the trial, summarized below, consisted of charts, statistical tables, and expert testimony. At the close of appellants' case, no evidence was offered by the State (R. 105-6) with the exception of historical maps supplied in response to the specific request of the court, a table

from the Bureau of Census* and a message from the President to the Congress. See Defts.' Exhs. A-H (R. 216-42, 106, 130-131). In its answer, the State pleaded no affirmative defenses (R. 19-20). The intervenors failed to introduce evidence in support of the affirmative defenses alleged in their pleading (R. 106); there thus being no evidence in the record to support these alleged defenses, the court below refused to consider or pass upon them (R. 175).

The court dismissed the complaint by a divided vote (R. 178). Each of the three judges wrote separate opinions, which are summarized below.

Appellants' Proof

Appellants introduced maps showing the boundaries of the four Congressional districts on Manhattan Island and extensive data showing the distribution on the Island of the white, non-Puerto Rican population, on the one hand, and the non-white, Puerto Rican population on the other. The non-white Puerto Rican classification derives from the census figures for New York City, which separately classify Negroes, other non-whites and persons of Puerto Rican origin (R. 61, Defts.' Exh. A, R. 217, 106). New York City agencies also separately classify persons of Puerto Rican origin for various purposes. See, e.g., N. Y. City Board of Education, TOWARD GREATER OPPORTUNITY 155 (1960).

The following table, from Pltfs.' Exh. 3 (R. 201), shows the population and racial group composition of the four districts:

*The table made the irrelevant point that the expanded 17th District contained a few more non-whites and Puerto Ricans than the old 17th District. However, as appellants showed, the percentage of non-whites and Puerto Ricans in the 17th District was reduced from 6.6% to only 5.1% despite an almost 50% increase in its population, see *infra* p. 7.

| District | Total Population | White | | Non-White and Puerto Rican Origin | |
|-------------|---------------------|------------|---------------|--------------------------------------|---------------|
| | | Population | % of District | Population | % of District |
| 17th | 382,320 | 362,668 | 94.9% | 19,652 | 5.1% |
| 18th | 431,330 | 59,216 | 13.7% | 372,114 | 86.3% |
| 19th | 445,175 | 318,223 | 71.5% | 126,952 | 28.5% |
| 20th | 439,456 | 318,482 | 72.5% | 120,974 | 27.5% |
| Total | 1,698,281 | 1,058,589 | 62.3% | 639,692 | 37.7% |

In order to give a visual picture of the racial and group composition of some of the borderline areas, appellants prepared a map which roughly shows the relative concentration of non-whites and Puerto Ricans in these areas. See Pltfs.' Exh. 4 (R. 202-205, 51). It should be noted that the shadings on this map show the racial and group composition of full census tracts only (R. 49, 50)—census tracts being areas of several square blocks, usually six or so, selected by the Bureau of Census to permit convenient tabulation of census figures (R. 42). It was only after Pltfs.' Exhs. 3 and 4 had been prepared that appellants were able to obtain from the Bureau of Census figures making possible a breakdown of some of the full census tract figures on a house-by-house basis (Pltfs.' Exh. 5, R. 49, 50, 61, 63). These detailed figures, which are included in the record as Pltfs.' Exh. 5 (R. 207, 63), show that the number and percentage of non-whites and Puerto Ricans within the 18th and 19th Districts and outside the 17th District is considerably greater than Pltfs.' Exhs. 3 and 4 would indicate (R. 63, 66, 69-75).

The testimony showed that the 11-sided, step-shaped boundary between the 17th and 18th Districts cuts through two census tracts, the racial and group composition of which, according to the house-by-house figures, is as follows (R. 63-66):

| | <u>Non-White Puerto Rican Population</u> | <u>Total Population</u> | <u>Non-White, Puerto Rican Population as % of Total</u> |
|---------------|--|-----------------------------|---|
| In 17th | 513 | 11,239 | 4.5 |
| In 18th | 1,935 | 8,553 | 22.6 |

The 18-sided boundary line between the 17th and 19th cuts through 10 census tracts, the racial and group composition of which, analyzed on a house-by-house basis, is as follows (R. 69-75):*

| | <u>Non-White Puerto Rican Population</u> | <u>Total Population</u> | <u>Non-White, Puerto Rican Population as % of Total</u> |
|---------------|--|-----------------------------|---|
| In 17th | 2,933 | 25,782 | 11.4 |
| In 19th | 6,690 | 35,100 | 19.1 |

As a result of the 1960 census, the number of Congressional districts in Manhattan was reduced from six to four. Although this reduction required expansion of the four remaining districts, the 17th remained 15.4% smaller than the adjacent 19th, 14% smaller than the 20th, 12% smaller than the 18th and more than 40,000 short of one-fourth of the Island's population. The following table shows the racial and group composition of the 17th District before and after the challenged statute (R. 216):

| | <u>Non-White Puerto Rican Population</u> | <u>Total Population</u> | <u>Non-White, Puerto Rican Population as % of Total</u> |
|----------------|--|-----------------------------|---|
| Old 17th | 17,176 | 260,235 | 6.6 |
| New 17th ... | 19,652 | 382,320 | 5.1 |

In expanding the 17th, the 1961 statute altered its boundaries in three respects: it added one area on the upper east side from 57th Street to 89th Street; added an area on

*In only one such tract is there a higher percentage of non-whites and Puerto Ricans in the 17th than in the 19th, but the number in the 17th is only 241 (R. 71).

the lower east side known as Stuyvesant Town; and dropped from the 17th and added to the 18th District a two-block area from 98th to 100th Streets and from Fifth to Madison Avenues. The racial composition of these three areas is shown in the following table (R. 76-77, 85-86):

| | <u>Non-White Puerto Rican Population</u> | <u>Total Population</u> | <u>Non-White, Puerto Rican Population as % of Total</u> |
|---|--|-----------------------------|---|
| Upper east side added to 17th ... | 2,749 | 101,716 | 2.7 |
| Stuyvesant Town added to 17th .. | 105 | 22,405 | 0.5 |
| Two-block area dropped from 17th and added to 18th | 359 | 806 | 44.5 |

Appellants also introduced statistics showing the effects of two hypothetical expansions of the 17th District as drawn by the legislature so as to make it equal in population to approximately one-fourth of the total of the Island.

The first hypothetical expansion of the district assumed that the western boundary of the 17th was straightened to follow Eighth Avenue and Central Park West along its entire length, that Stuyvesant Town was not added on the south and that enough full census tracts were added on the northern boundary to bring the population to about one-fourth of the total for the Island. The racial and group composition of this hypothetical district compares as follows with the actual 17th District (R. 82-83):

| | <u>Non-White Puerto Rican Population</u> | <u>Total Population</u> | <u>Non-White, Puerto Rican Population as % of Total</u> |
|--|--|-----------------------------|---|
| Hypothetical Expanded District ... | 59,486 | 425,014 | 13.9 |
| Actual 17th District ... | 19,652 | 382,320 | 5.1 |

The second hypothetical expansion assumed that the western boundary of the 17th was straightened as above, that its northern boundary was straightened to eliminate the two cut census tracts (by extending it across 98th Street to Third Avenue and then south on Third to 89th) and that enough census tracts were added on the south to bring its total population up to about one-fourth of the total for the Island. The racial and group composition of this hypothetical expansion of the existing district by comparison with the actual 17th is as follows (R. 86-87):

| | <u>Non-White Puerto Rican Population</u> | <u>Total Population</u> | <u>Non-White, Puerto Rican Population as % of Total</u> |
|--|--|-----------------------------|---|
| Hypothetical Expanded District | 36,134 | 427,351 | 8.5 |
| Actual 17th District | 19,652 | 382,320 | 5.1 |

Appellants also produced on trial three additional hypothetical plans, each of which would have divided the Island into four districts of roughly equal population, using full census tracts and well-known streets and arteries as dividing lines—together with the racial and group distribution produced by each plan. See Pltfs.' Exhs. 6A, 6B, 6C (R. 208, 210, 212, 90). Plan A created Southern and Northern and East and West Side districts, and produced the following distribution of the Island's non-white and Puerto Rican population (R. 89, Pltfs.' Exh. 6A, R. 208):

| <u>District</u> | <u>Total Population</u> | <u>Non-White and Puerto Rican Population as % of Total</u> |
|--------------------|-------------------------|--|
| Southern | 421,284 | 22.3% |
| Eastern | 429,069 | 32.2% |
| Western | 424,269 | 37.1% |
| Northern | 423,659 | 59.1% |

Under Plan B three east-west lines would be drawn across the Island (much like the lines drawn across the Island in the 1911 districting). (Defts.' Exh. C, R. 232, 131) thereby creating the same Northern and Southern districts as under Plan A, but also creating South Central and North Central districts. The population and percentage of non-whites and Puerto Ricans would be as follows (Pltfs.' Exh. 6B, R. 210, 89-90):

| <u>District</u> | <u>Total Population</u> | <u>Non-White and Puerto Rican Population as % of Total</u> |
|------------------|-------------------------|--|
| Southern | 421,284 | 22.3% |
| South Central .. | 419,129 | 9.5% |
| North Central .. | 434,209 | 58.9% |
| Northern | 423,659 | 59.1% |

Under Plan C the Island would be divided centrally from 14th Street North to the Harlem River, thereby creating Southeast, Southwest, Northeast and Northwest districts. The population and percentage of non-whites and Puerto Ricans would be as follows (Pltfs.' Exh. 6C, R. 212, 90):

| <u>District</u> | <u>Total Population</u> | <u>Non-White and Puerto Rican Population as % of Total</u> |
|-----------------|-------------------------|--|
| Southeast | 430,655 | 22.4% |
| Southwest | 418,630 | 31.6% |
| Northeast | 422,156 | 43.0% |
| Northwest | 426,840 | 53.8% |

On cross examination, appellant's witness gave additional statistics showing the racial and group composition of the borderline areas of the 17th. The area between 89th and 94th Streets and between Third Avenue and the East

River, which is just outside the 17th, has a total population of 10,507 persons of which 5% or less are non-white and Puerto Rican. Appellants introduced as exhibit 7 (R. 214, 120) a letter from the New York City Housing Authority stating that this area has since May 1959 been scheduled for a low-cost publicly assisted housing project, currently under construction, of the type in which the average non-white and Puerto Rican occupancy is about 75% in Manhattan. Appellants' witness further testified that the area between 14th and 19th Streets and First and Third Avenues has a total population of 6,862 of which 12.2% or 837 are non-whites and Puerto Ricans (R. 99). He also testified that the area between 34th and 42nd Streets and Sixth and Eighth Avenues, which is contained in the 17th, has a total population of 758, of which 24.4%, or 185, are non-whites and Puerto Ricans, and that the area between 34th and 42nd Streets and Eighth and Tenth Avenues which is outside the 17th and inside the 19th, has a total population of 5,824, of which 16.3%, or 949, are non-whites and Puerto Ricans (R. 102-03).

Opinions, Below

Judge Moore took the position that racially segregated voting districts are constitutional absent a showing of serious underrepresentation or other specific harm to the individuals concerned. He stated that plaintiffs "must show more than a mere preference to be in some other district and associated for voting purposes with persons of other races or other countries of origin" (R. 159) and noted that "plaintiffs have not even shown that their voting status will be changed in any way" (R. 162-3).

Judge Moore also took the position that segregated voting districts could be constitutionally justified, or even constitutionally required, because they may enable persons

of the same race or place of origin "to obtain representation in legislative bodies which otherwise would be denied to them" (R. 164).

Even if segregated voting districts could violate the Constitution, Judge Moore was of the opinion that they could be unconstitutional only if the legislature's "motive" was to create such districts; that plaintiffs must introduce proof of this "motive"; and that, in this case, no such proof was tendered by the plaintiffs (R. 163).

Judge Feinberg disagreed with Judge Moore's view that segregated voting districts are constitutional absent serious underrepresentation, stating that the "constitutional vice [is] the use by the legislature of an impermissible standard and the harm to plaintiffs that need be shown is only that such a standard was used" (R. 171). Judge Feinberg also disagreed with the view that segregated districts could be constitutionally justified by alleged advantages to persons of a particular race or place of origin. In Judge Feinberg's opinion, "good" segregation is as repugnant as "bad" segregation (R. 173).

However, Judge Feinberg agreed with Judge Moore that plaintiffs must show a legislative "motive" or "intent" to segregate as a prerequisite to a finding of unconstitutionality (R. 174, 176). He cast his deciding vote on the grounds that plaintiffs have a "difficult burden" to meet in attacking the constitutionality of a state statute, citing cases not involving racial segregation, that plaintiffs must prove that such segregation is the "only available inference," even in the absence of any proof by the defendants (R. 176); that plaintiffs' evidence in this case "might justify" a finding of a legislative motive to segregate, but that other inferences are "equally" persuasive (R. 176, 177). The only such inference specifically cited by Judge Feinberg

was that the legislature intended to classify persons by "social and economic background," (R. 177), an inference regarding which there was no evidence whatever in the record.

In his dissent, Judge Murphy agreed with Judge Feinberg as to the applicable constitutional standards. But on his view of the record, the plaintiffs carried their burden of proving that "the legislation was solely concerned with segregating white, and colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (R. 167); that the legislation had effected "obvious segregation" (R. 170); and that the statute constituted a "subtle exclusion of Negroes from the 17th" and a "jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors" (R. 170). Accordingly, Judge Murphy thought plaintiffs had met their burden of proving segregation within *Hernandez v. Texas*, 347 U. S. 475, 479-81 (1954), and, in the absence of any proof by the state or by intervenors, were entitled to a judgment declaring the statute unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

Summary of Argument

I.

A. Segregation of Congressional districts by race and place of origin violates the Fourteenth Amendment.

It is no longer open to argument that separate classification of persons by race or place of origin in respect of any public institution or facility constitutes an "invidious discrimination" prohibited by the Fourteenth Amendment. *Johnson v. Virginia*, 373 U. S. 61, 62 (1963). Such classi-

fication is inherently unequal, *Brown v. Board of Education*, 347 U. S. 483 (1954), and no rule of reasonableness, such as that applicable in cases involving non-invidious classifications, may be employed to sustain it. *Ferguson v. Skrupa*, 372 U. S. 726, 732 (1963).

Because Congressional Districts are public institutions, their segregation produces inherent inequality as much as segregation in, for example, courtrooms, *Johnson v. Virginia*, *supra*, and they likewise fall within the 14th Amendment invidious discrimination rule. Moreover, States must be held to especially high standards in the creation of Congressional districts since they involve the franchise, which is basic to all other rights, and since the States, in creating them, are performing a function specifically delegated by Article I, § 2 of the Constitution and by an Act of Congress (2 U. S. C. § 2 (a)). Finally, use of invidious classifications in creation of Congressional districts must be specially scrutinized because of the ease with which a legislative majority can, as here, manipulate the district lines to the permanent detriment of those who are thus denied effective representation. *Cf. Gomillion v. Lightfoot*, 364 U. S. 339 (1960).

B. Appellants proved that the purpose and effect of the statute here challenged was to create invidiously discriminatory Congressional districts. All of their proof pointed to one central conclusion: that the legislature could not have more completely segregated on the basis of race and place of origin. It could not, on an Island with nearly 40% non-whites and Puerto Ricans, have created a single district with a higher percentage of white, non-Puerto Ricans than the 17th (94.1%) and another district with a higher percentage of non-whites and Puerto Ricans than the 18th (86.3%)—(unless, of course, the population of these two already undersized districts were fur-

ther reduced). As shown by the detailed statistics and maps introduced by appellants at trial, the district lines are gerrymandered without apparent reason; any expansion of the 17th, which is 12-15% smaller than the other three districts, would increase the number and percentage of non-whites and Puerto Ricans within its boundaries; any straightening of the highly irregular 35-sided boundary of the 17th, and particularly the boundary between the 17th and 18th, would detract from the racial homogeneity of both districts; the changes effected by the 1961 statute serve to minimize the non-white, Puerto Rican population of the 17th District and maximize the non-white, Puerto Rican population of the 18th; and use of reasonably objective criteria for dividing the Island into four districts could not achieve a comparable pattern of segregation.

C. The foregoing proof was at least sufficient to raise a rebuttable presumption of unconstitutionality and to shift the burden of producing evidence to the State. *Hernandez v. Texas*, 347 U. S. 475, 479-81 (1954); *Gomillion v. Lightfoot*, 364 U. S. 339, 341 (1960). In the absence of rebuttal evidence by the state or the intervenors, appellants were entitled to a judgment in their favor.

A factual pattern of segregation, even if unintended by the legislature, violates the Fourteenth Amendment. See *Eubanks v. Louisiana*, 356 U. S. 584, 588 (1958); cf. *N. A. A. C. P. v. Button*, 371 U. S. 415, 439 (1963). But even if legislative purpose were deemed Constitutionally relevant, plaintiffs need not show as part of their *prima facie* case that the state's purpose was to segregate. Once a factual pattern of segregation has been proved by plaintiffs, evidence of a purpose other than to segregate must be alleged and proved by defendants as an affirmative defense. However, plaintiffs in this

case, out of an abundance of caution, did in fact prove purposeful segregation. (In the absence of relevant legislative history, plaintiffs' proof of legislative purpose consisted of inferences drawn from the effects of the statute and from the effects of objective alternatives.)

It would also be Constitutionally irrelevant if the legislature, while intending to create segregated districts, did so in order to favor the non-whites and Puerto Ricans on the Island. See *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960); *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961). In any event, the burden of introducing evidence to show that the creation of segregated districts in Manhattan benefits non-whites and Puerto Ricans, even if Constitutionally relevant, would be upon the State or the intervenors, who failed to introduce such proof in this case.

D. The prevailing judges in the court below applied Constitutional standards and measures of proof which in effect permit unbridled segregation. Judge Moore apparently regarded segregated Congressional districts as Constitutional unless such segregation is coupled with substantial under-representation of the group thus segregated. Judge Feinberg, while applying proper Constitutional standards, erroneously believed that plaintiffs must prove as part of their *prima facie* case that the legislative "motive" was to segregate and, further, that such "motive" is the "only available inference." Properly, plaintiffs had only to show that invidious discrimination was a sufficiently reasonable inference to warrant shifting the burden to the State to produce rebuttal evidence. Even so, Judge Feinberg was able to avoid the force of the uncontradicted proof of purposeful segregation in this case only by speculating beyond the record and by grossly misreading the facts contained in the record.

II.

The Fifteenth Amendment also bans the segregation of voters into racially separate voting districts. See *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). The "separate but equal" doctrine has never been applied in Fifteenth Amendment cases, see *Smith v. Allwright*, 321 U. S. 649 (1944) and *Terry v. Adams*, 345 U. S. 461 (1953), and an abridgment of voting rights in the Fifteenth Amendment sense thus occurs from segregated voting, even absent the loss of the right to vote in the same or similar elections. Moreover, in this case, an abridgment of voting rights has occurred by reason of the fact that virtually all non-whites and Puerto Ricans of Manhattan have been placed in districts in which their votes count 12-15% less than the votes of the residents of the all-white 17th District.

Hence, the record in this case, discussed above in relation to the Fourteenth Amendment, also establishes segregation of Congressional districts and under-representation of non-whites and Puerto Ricans in violation of the Fifteenth Amendment.

III.

The relief requested is a judgment pursuant to 28 U. S. C. § 2201 declaring the challenged portion of the statute unconstitutional. Such relief would leave the legislature adequate time prior to the 1964 Congressional elections to adopt a new statute either at its regular session, which convenes in January 1964, or at an extraordinary session such as that at which the challenged statute was adopted.

Declaratory relief of this type has proven effective elsewhere in causing the legislatures to redistrict in accordance with constitutionally permissible standards. It need not impair the ability of the incumbent Congressmen to serve out their terms.

ARGUMENT

I. The Challenged Portion of the Statute Segregates Congressional Districts by Race and Place of Origin in Violation of the Fourteenth Amendment.

A. The Constitutional Standard

Although this is the first case in this Court challenging segregation in the creation of Congressional districts, it should be governed by the Constitutional standards which have been elaborated in other segregation cases.

It is now clear that the Equal Protection Clause of the Fourteenth Amendment bars all classifications based upon race or place of origin*. While the States may classify citizens for regulatory purposes on whatever other grounds they will so long as the classification is based upon "differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud*, 344 U. S. 457 (1957), whenever a State separately classifies any "easily identifiable group [requiring] the aid of a court in securing equal treatment under law . . .", this rule of reason is inapplicable. *Hernandez v. Texas*, 347 U. S. 475, 478 (1954). Such segregation or "invidious discrimination" is outlawed no matter what reasonable grounds the State may advance to justify it. *Ferguson v. Skrupa*, 372 U. S. 726, 732 (1963).

This rule barring invidious discriminations applies in cases of segregation of Congressional voting districts as well as in cases of segregation of public schools, places of public amusement, courtrooms and other public facilities.

*The Due Process clause also proscribes all invidious discriminations, and its coverage appears co-extensive with that of the Equal Protection Clause. Compare *Bolling v. Sharpe*, 347 U. S. 497 (1954) with *Brown v. Board of Education*, 347 U. S. 483 (1954). And see *Griffin v. Illinois*, 351 U. S. 12, 17 (1956) and *Gideon v. Wainwright*, 372 U. S. 335 (1963).

Johnson v. Virginia, 373 U. S. 61, 62 (1963). Contrary to the apparent view of Judge Moore in the court below, Congressional districting should not be held to fall outside the rule on the ground that its harmful effects are less apparent. The rule assumes that invidious discriminations between classes of citizens result in harm constituting a deprivation of Constitutional rights. Separate classifications based upon race or place of origin are inherently unequal. *Brown v. Board of Education*, 347 U. S. 483 (1954).

As illustrated by this case, the harm which necessarily flows from invidious discriminations between classes of citizens in drawing Congressional district boundaries is at least as inevitable as that which results from segregation of schools, courtrooms and other public facilities. The presumption of harm resulting from invidious discriminations is doubly warranted in a case involving Congressional districts because of the ease with which a legislative majority, free to engage in such discriminations, can manipulate districts to the permanent detriment of the group discriminated against. This manipulation can be accomplished behind the scenes in the legislative process by which district lines are drawn and may be obscured by seemingly innocuous enactments. In this case, the Negroes and Puerto Ricans of Manhattan, have been jammed into a single Congressional district. They have thus been foreclosed from the exercise of any effective political power in the other three districts of the Island, despite the fact that they constitute nearly 40% of the total population. Were the district boundaries drawn without regard to considerations of race or place of origin, as illustrated by appellants' hypotheticals, Negroes and Puerto Ricans would have more representation in Congress. They would have the pivotal votes in all four districts or a majority of the votes in two districts.

The inherent inequality of segregated Congressional districts also results from the fact that Congressional districts are important entities within which various public and private activities are necessarily organized. The badge of segregation is equally odious in these circumstances as in the case of the segregation of any other public institutions. While it is true that Congressional districts may have less impact upon the persons residing in them than, say, public schools upon their pupils, this fact should not affect the nature of the constitutional test to be applied. On the contrary, it could be grounds for holding the states to a higher standard because the encroachment upon the prerogatives of the State in barring discriminatory manipulation would be less serious than the prohibition of segregation in public school systems. The latter have traditionally been regarded as of solely local concern—whereas Congressional districts are Constitutionally created components of the national government.

The discredited "separate but equal" doctrine, even at the height of its influence, was not applied in cases involving voting rights, see *Nixon v. Herndon*, 273 U. S. 536 (1927), and *Nixon v. Condon*, 286 U. S. 73 (1932), invalidating separate white primaries without inquiring into the question of equality. It should not be applied in this day and age to justify the existence of segregated Congressional voting districts. Had the hurdle of justiciability not been present in *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), the Court would, it seems, have held the 14th Amendment invidious discrimination rule applicable in that case, which involved the boundaries of a municipality; Mr. Justice Whittaker, concurring in *Gomillion*, and Mr. Justice Douglas, in his separate opinion in *Baker v. Carr*, 369 U. S. 186, 244 (1962), made clear that in their view the segregation of voting districts would fall within the invidious discrimination rule of the 14th Amendment. Com-

mentators on the cases have taken the same position. See *Note*, 72 YALE L. J. 1041, 1061 (1963); Emerson, *Malapportionment and Judicial Power*, 72 YALE L. J. 64, 74 (1962).

Indeed, the States should be held to especially high Constitutional standards in the creation of Congressional districts because the manner in which the lines of Congressional districts are drawn is basic to all other rights under the Constitution—it determines the composition of the national legislature and the effectiveness of the franchise of the citizens of the States in selecting their representatives. The Civil War amendments to the Constitution reflect a special concern with the right to vote, as nearly a century of litigation in this Court has well demonstrated. See *e.g.*, *Nixon v. Herndon*, 273 U. S. 536 (1927). And, in drawing the boundaries of Congressional districts the States are performing a function which has been specifically delegated to them by Article I, § 2 of the Constitution and by an Act of Congress, 2 U. S. C. § 2(a). Hence, even if the Civil War amendments did not specifically require equal treatment of all citizens in regard to the franchise, the Constitution would nevertheless ban Congressional district statutes which discriminate against classes of voters. *McDougall v. Green*, 335 U. S. 281, 288 (1948) (dissenting opinion).

B. Appellants' Proof of Segregation

In the court below, appellants proved that the purpose and effect of the challenged portion of the statute was to create the type of invidious discrimination which the 14th Amendment prohibits. All of their proof showed that the legislature could not have created a more segregated pattern in the Congressional districts of Manhattan—that is, one virtually all white district (about 95% white, non-Puerto Ricans) and a second virtually all non-white-Puerto Rican

district (about 86% non-whites and Puerto Ricans) on an Island which is about 40% non-white-Puerto Rican.*

The absence of meaningful legislative history of the challenged statute made difficult appellants' efforts to prove the legislative purpose. The statute was adopted by the legislature, without public hearings or recorded debates, the day after it was first introduced into a two-day extraordinary session of the legislature. The only legislative history is a report issued by a special committee of the legislature which discusses only the question of the numerical disparities in the population of the districts throughout the entire State. See Jurisdictional Statement 9b-14b. The report does not remotely touch upon the question here involved—namely, the reasons for the configurations of the various districts and, in particular, for the crazy-quilt pattern of the four districts on the Island of Manhattan.

In order to prove purposeful segregation, appellants were therefore obliged, as is always the case when a State acts subtly rather than openly, to draw inferences from the effects of the statute and from objective alternatives. The irrationally gerrymandered configuration of the four Manhattan districts coupled with their otherwise inexplicable numerical disparities and racial and group composition are, without more, sufficient to compel an inference of legislative purpose to segregate by race and place of origin. The Island of Manhattan does not contain any natural political subdivisions, and the boundaries of the four Congressional districts do not generally follow what-

*Separate classification of non-whites and Puerto Ricans in New York County is the type of invidious discrimination which the Fourteenth Amendment proscribes. Both the Federal Census Bureau and local agencies recognize that Puerto Ricans are an "easily identifiable group" and, together with non-whites, require the "aid of the courts in securing equal treatment under law." *Hernandez v. Texas*, 347 U. S. 475, 478 (1954). The court below, composed of judges familiar with local circumstances, did not question this view.

ever natural geographic subdivisions the Island might be deemed to have. For example, the boundary between the 17th and 18th Districts does not follow a major cross-town artery, such as 96th and 110 streets, but pursues obscure cross streets on its tortuous path; and the boundary between the 17th and 19th Districts, rather than following the border of Central Park and continuing south down 8th Avenue, a major north-south thoroughfare, undergoes four detours off side streets in covering the same distance. These irregular boundaries and the size differences must therefore reflect a legislative purpose to classify persons on some sort of subjective basis. The fact that the districts as drawn create one virtually all-white district and an adjoining virtually all Negro-Puerto Rican district, on an Island about 40% non-white and Puerto Rican, requires an inference that the subjective basis employed by the legislature was race and place of origin.

However, appellants further tested this inference by introducing various additional elements of proof. Thus, they analyzed some of the key border areas and found that expansion of the 17th in any direction would increase the percentage of non-whites and Puerto Ricans within its boundaries and that any straightening of the irregular boundaries of the 17th and particularly the boundary between the 17th and 18th would detract from the racial homogeneity of both districts. They examined the changes effected by the statute and found that they minimize the non-white, Puerto Rican population of the 17th District and maximize the non-white, Puerto Rican population of the 18th. They also proved that the use of reasonably objective criteria for dividing the Island into four districts could not achieve a comparable pattern of segregation.

Since it is the "totality of the circumstances" which must be weighed in determining the constitutionality of a

statute, *Johnson v. Virginia*, 373 U. S. 61 (1963), all of these elements of the appellants' proof must be viewed together; for simplicity of exposition, however, each will be discussed separately below:

1. *Expansion or straightening of the boundaries of the 17th and 18th Districts.* The two segregated districts, the 17th and 18th, are also the smallest districts and those with the most irregular boundaries, and neither could be expanded or have its boundaries straightened without significantly altering its racial homogeneity.

The maps introduced as Plaintiffs' Exhibit 4 visually demonstrate that any expansion of the 17th District or straightening of its lines would significantly increase its non-white and Puerto Rican population. The refinements of census tract data, showing that about 70% of the non-white Puerto Rican population in the full census tracts cut by the boundaries of the 17th actually falls outside the 17th, *supra*, p. 7, further strengthens this graphic demonstration of the purposeful creation of, in effect, an all-white district.

The boundary between the 17th and 18th is a conspicuously step-shaped configuration which cuts through two census tracts so as to place the bulk of the non-whites and Puerto Ricans in those tracts into the 18th and the bulk of the white, non-Puerto Ricans into the 17th. Had these two full tracts been placed in the 17th, the result would have been to add 8,553 persons to that district, 22.6% of whom would be non-white and Puerto Rican, *supra* at pp. 6-7. Had the full tracts been placed in the 18th, the result would be to add 11,239 persons to that district, 95.5% of whom would be white, non-Puerto Ricans, *ibid.* In either case the result would be to expand one of the two relatively small districts and decrease its racial homogeneity (assuming, of course, that the other district were expanded elsewhere so as to make up for its loss of population).

The purpose and effect of the irregular boundary between the 17th and 18th is made abundantly clear by more detailed analysis. The two-block area between 98th and 100th Streets and Fifth and Madison Avenues, which was the only area dropped from the old 17th and transferred to the 18th, contains 44.5% non-whites and Puerto Ricans, *supra*, p. 8. The one block from 97th to 98th Streets between Park and Madison Avenues, which is placed in the 18th by the next step down in the boundary, contains 32.3% non-whites and Puerto Ricans, compared with 3.5% in the rest of the same census tract which is placed in the 17th (R. 64).

The boundary between the 17th and 19th also illustrates the purpose and effect of the statute. If the ten cut census tracts on this boundary were placed entirely within the 17th, the result would be to increase its population by 35,100 persons, thus making both the 17th and 19th more nearly equal to one-fourth of the total for the Island, but the population added would be 19.1% non-white and Puerto Rican, *supra* p. 7. If the boundary between the 17th and the 19th were straightened to run along Central Park West and Eighth Avenue, the result would be to reduce the population of the 17th by 19,000 persons and to increase its percentage of non-whites and Puerto Ricans (R. 82). Although the area between 34th and 42nd Streets and Sixth and Eighth Avenues, which is just inside the western boundary of the 17th, has a slightly higher percentage of non-whites and Puerto Ricans than the district as a whole, it contains a total of less than 758 persons and could have been excluded from the district only by further gerrymandering of its boundaries (R. 102).

To demonstrate further the effect of expanding and straightening the boundaries of the 17th District, the appellants introduced statistics regarding two hypothetical alterations of the District, *supra* pp. 8-9. The hypothetical straightening and expansion to the north would result in a

population 14% non-white and Puerto Rican, as against 5.1% in the present 17th. The hypothetical straightening and expansion to the south would result in a population 8.5% non-white and Puerto Rican. Hence, these hypotheticals are further probative evidence of the purposeful segregation.

Inclusion in the 18th of the area bounded by 89th to 95th Streets and Third Avenue and the East River, referred to by the State in its Motion to Dismiss or Affirm, does not contradict the purpose and effect of segregation. That area contains only 10,507 persons (R. 99), and its addition to the 17th would still leave the population some 30,000 short of one-fourth of the Island. More important, the area has since May 1959 been scheduled for construction of a new low-cost public housing project of the type in which the average non-white Puerto Rican occupancy in Manhattan is almost 75% (R. 214). Its exclusion from the 17th and inclusion in the 18th was thus essential to continuation of the racial homogeneity of these two districts during the ten years before a new redistricting statute would normally be enacted.

Nor is the commercial and warehouse area outside the southwest end of the 17th District, also referred to by the State in its Motion to Dismiss or Affirm, inconsistent with the purpose and effect of segregation. It contains very few persons and could be added to the 17th only by bisecting the 19th or otherwise creating grotesque additional gerrymandering in the boundaries of the two districts.

2. *History of the 17th and 18th Districts.* The 17th and 18th districts appear to be the favored districts since they were the first two districts drawn by the statute and were carved out of the center of the Island. The other two appear to be merely filler districts designed to preserve the pattern established by the first two. The record shows that the 17th District, which alone among the four has an his-

torical continuity, had developed from a rectangle at the time it was first established in 1911 into its present 35-sided configuration (R. 232). And, as the intervenors stated in their pleading, the new 18th "retained heavily its Negro and Puerto Rican character under the present redistricting." (R. 17)

Although appellants did not find it necessary as part of their *prima facie* case to obtain the extensive statistical data which would be necessary to show that all of the historical shifts in the 17th and 18th districts corresponded to the shifts in white and minority groups population, as seems quite likely, they did introduce extensive statistical data regarding the changes made by the 1961 statute. This data clearly shows that the changes effected by that statute had the purpose and effect of segregating voters by race or place of origin.

Although reduction of the number of districts in Manhattan from six to four necessarily resulted in expansion of the 17th's population by about 50%, the percentage of non-whites and Puerto Ricans within its boundaries was actually reduced from 6.6% to 5.4%, *supra* p. 7. And despite this expansion, one area was inexplicably removed from the 17th District and placed in the 18th: the area then in the 17th with the highest population of non-white and Puerto Rican persons (44.5%) *supra* p. 8. Moreover, expansion of the 17th was accomplished by including all-white Stuyvesant Town without including an adjacent, more logically contiguous area containing a population with 12.2% non-whites and Puerto Ricans, a percentage 25 times as large as that of Stuyvesant Town. In order to omit these two areas, the legislature was obliged to make five unnecessary zig-zags in the boundaries of the district. The only two areas added to the 17th to accomplish the expansion were areas along the East River which had become virtually all-white, non-Puerto Rican (about 98%) at the time the statute was adopted.

The legislature could not have added additional population to the 17th to make it reasonably equal in population to one-fourth of the total for the Island without substantially increasing its non-white and Puerto Rican population. The conclusion is thus inescapable that the district was deliberately kept 12-15% smaller than the others so as to achieve the pattern of segregation which otherwise could not have existed.

The 1961 statute split one of the six former districts on the Island, adding a portion to the new 17th and a portion to the new 18th (See Defs.' Exh. G, R. 241, 131). The portion added to the new 17th had a white, non-Puerto Rican population of 97.3% (R. 7) while the portion added to the new 18th was overwhelmingly non-white and Puerto Rican (with the exception of the area, discussed above, which is scheduled for a low-cost public housing project) so that the 18th "retained heavily its Negro and Puerto Rican character." (R. 17).

3. *Use of Objective Criteria.* The purpose and effect of segregation is also apparent from drawing hypothetical district lines on the basis of reasonably objective criteria. Such criteria do not result in the creation of districts with anywhere near the same racial and group homogeneity as the present districts.

Manhattan being an island with no political and few natural geographic dividing lines, very few such criteria exist. One which is obvious is use of the boundaries of the full census tracts, which the legislative committee undoubtedly had available to it. (See Jurisdictional Statement 13b). The boundaries between the 17th District and the 18th and 19th do not follow the census tracts but, rather, cut through 12 such tracts. In all but one of the cut tracts, the percentage and total number of non-whites and Puerto Ricans inside the 17th is substantially smaller than in the adjoining area inside

the 18th or 19th District, and, overall, the percentage of non-whites and Puerto Ricans inside the 17th is about 9% and the percentage outside is about 20%, *supra* p. 7. Hence, had the full census tracts been utilized, the racial percentages of the three districts would have been significantly altered.

The only other wholly objective criterion available is regular geometric division of the Island into four districts, using major streets and the borders of Central Park as dividing lines. Appellants' three hypotheticals dramatically show that the use of these criteria do not result in racial and group homogeneity anywhere near that achieved in the present 17th and 18th Districts, *supra* pp. 9-10. The lowest percentage of non-whites and Puerto Ricans in any district in any of the three hypotheticals was 9.5% in the "South Central" district of "Plan B," double that in the present 17th. But, unlike the present statute, Plan B did not also result in a single district in which most of the non-whites and Puerto Ricans were jammed into a single district. Rather, it has *two* districts in which non-whites and Puerto Ricans constitute more than 50% of the population. In the remaining two hypotheticals, there is no district with less than 20% non-whites and Puerto Ricans, and each contains one district in which non-whites and Puerto Ricans constitute a majority of the population.

The conclusion from all of the foregoing is that the record establishes that the challenged portion of the statute purposefully created segregated Congressional districts. At the very least, the record sustains a sufficiently strong inference of purposeful segregation to have shifted the burden of rebutting this inference to the State and the intervenors and thus, in the absence of proof by them, to require judgment for the appellants.

C. Standard of Proof

There is no question that the statute would be unconstitutional if it had expressly provided for the establishment of one district to be composed of all-white, non-Puerto Ricans and another district to be composed entirely of non-white and Puerto Ricans. But a statute may be invidiously discriminatory even if it does not establish the discrimination by express terms, for as frequently has been stated, the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U. S. 339, 342 (1960).

Moreover, discrimination may be invidious without being so sweeping as to classify separately 100% of that class of citizens being discriminated against. This should be especially so in the case of Congressional districts, in which a minority group with only a small percentage of votes is as effectively foreclosed from participation in the life of the district as a group totally excluded. The classification need not be complete in order to bring into play the invidious discrimination rule of the 14th Amendment. Cf., *Gomillion v. Lightfoot*, *supra*, in which some 25% of the persons remaining in the all-white City of Tuskegee were Negroes. Lucas, *Gomillion v. Lightfoot*, SUPREME COURT REVIEW, 194, 198 (1961).

Furthermore, were a rule of 100% applied, urban Congressional districts would be immune from Constitutional scrutiny, for in drawing district lines in a heavily populated area, it is inconceivable that anything near 100% segregation could possibly be achieved even if the most deliberate and detailed methods were employed. And appellants have shown that no other drawing of the district lines in Manhattan could have resulted in two districts with greater racial homogeneity.

The fact that appellants did not introduce proof in the trial court to rebut the unproven allegation that the statute

benefits the group which is the subject of the segregation is irrelevant. As Judge Feinberg pointed out, "good" segregation is no more justifiable under the Constitution than "bad" segregation. The State must be entirely "neutral" and refrain itself from taking any action which results in an invidious discrimination which the 14th Amendment proscribes. See *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961). Note, 70 YALE L. J. 126 (1960); Bittker, *The Case of the Checker Board Ordinance*, 71 YALE L. J. 1387 (1962). Hence, even if it were proved that segregation of the Congressional districts in New York County were designed to ensure the intervenors in this case "control" of the 18th Congressional District (R. 17), that would only serve to emphasize the fact that unlawful segregation occurred.

Even if a beneficial effect could justify an invidiously discriminatory statute, those asserting its validity should have the burden of showing such effect. Failure of the state or intervenors to introduce any evidence of the alleged beneficial effect of the statute thus forecloses any further argument on this point at this late stage of the litigation.

Nor were appellants obliged, as they did only out of an abundance of caution, to introduce proof that the New York State legislature intended to create segregated districts. Under the invidious discrimination rule, such proof is legally irrelevant. When basic Constitutional rights are involved, unintended as well as intended violations of those rights are equally prohibited. See, e.g., *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 461 (1958); *N. A. A. C. P. v. Button*, 371 U. S. 415, 439 (1963). An absence of legislative motive or purpose to segregate has never been deemed a valid defense to segregation, even in those cases in which segregation was not expressly provided for in the statute. See *Eubanks v. Louisiana*, 356 U. S. 584, 588 (1958); and see

Branche v. Board of Education, 204 F. Supp. 150 (E. D. N. Y. 1962). The courts seem universally to have assumed that, when the invidious discrimination rule applies, the motives or the purpose of the legislature are entirely irrelevant. There is no room in such cases for the alternative 14th Amendment test which would justify a statutory classification whenever the state can show a "reasonable" basis for it, *Morey v. Doud*, 344 U. S. 457 (1957).

Even assuming *arguendo* that legislative purpose were deemed legally relevant, plaintiffs in a segregation case need not prove such purpose as part of their *prima facie* case. As in other civil litigation, plaintiffs establish a *prima facie* case by introducing "evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." See 9 WIGMORE, EVIDENCE 299 (1940).

Hence, under the invidious discrimination rule, evidence of a factual pattern of segregation is sufficient to raise a rebuttable presumption of unconstitutionality of state action and shift the burden of producing evidence to the State. *Hernandez v. Texas*, 347 U. S. 475, 479-81 (1954); *Gomillion v. Lightfoot*, 364 U. S. 339, 341 (1960). In other words, once a *prima facie* case is proved, a purpose other than a purpose to segregate must be pleaded and proved by the State. It, in form, has the affirmative obligation on this question. It is in a better position to adduce evidence of legislative purpose, and in fairness should be required to prove such purpose. See 9 WIGMORE, EVIDENCE § 2486 (1940). This rule is made both desirable and necessary by the ability of a State, as in this case, to obscure the motives for its actions. Legislatures may normally be deemed to intend the natural consequences of their acts, and proof of the existence of a pattern of segregation should be sufficient to shift the burden to the State to prove that its intentions were otherwise.

Since a full trial was held and the State and intervenors were given full opportunity to rebut appellants' case, but failed to introduce any rebuttal evidence, judgment should have been entered for plaintiffs as Judge Murphy urged. Any matter not within plaintiffs' *prima facie* case must be pleaded and proved by defendants as an affirmative defense. 2 MOORE, FEDERAL PRACTICE 1841-62 (2d ed. 1962). The adversary system wisely shifts the burden so that defendants choosing to sit on their hands must do so at the cost of losing the law suit. Unless this sanction is employed, proper allocation of the burden of producing evidence in segregation cases would be rendered meaningless.

D. Error of the Court Below

The prevailing opinions in the court below failed to find unlawful segregation because they applied erroneous constitutional standards and measures of proof. Judge Moore regarded segregated Congressional districts as constitutional unless such segregation is coupled with substantial under-representation. This view is suggested at several points in his opinion (R. 159; 162-3), and Judge Feinberg criticizes Judge Moore's opinion as adopting this view without contradiction by Judge Moore (R. 171). Because he thus applied an erroneous Constitutional standard, Judge Moore did not discuss the factual record to determine whether or not it would support a finding of purposeful segregation.

Judge Feinberg, while applying the proper constitutional standard, applied erroneously high standards of proof and ignored the import of the evidence in the record so as to render virtually impossible the task of plaintiffs attempting to prove segregation.

(1) Judge Feinberg would require proof of a legislative "motive" to segregate as an indispensable element of the

plaintiff's *prima facie* case. This requirement is erroneous for the reasons elaborated above—namely, that legislative “motive” is constitutionally irrelevant and, even if it is not, proof by plaintiffs of a factual pattern of segregation suffices to make out a *prima facie* case and to shift the burden to the State to produce evidence of an alternative legislative purpose, if there be any.

(2) Judge Feinberg viewed the test as being whether the “only available inference” was that the legislative motive was to segregate, and further stated that plaintiffs have a “difficult burden” of proof, citing cases not involving racial segregation. This language as well as Judge Feinberg's inadequate answer to Judge Murphy's question, “What more must plaintiffs prove?”, indicates that he imposed a standard of proof comparable to that required to prove criminal intent by circumstantial evidence. 3 WHARTON, CRIMINAL EVIDENCE § 980 (12th ed. 1955). The quantum of evidence required to put a man in jail is surely greater than that which plaintiffs should be required to adduce in order to establish racial segregation.

Even when all the proof is in, plaintiffs in a civil case need prove their allegations only by a preponderance of the evidence. But their initial burden of coming forward with evidence to establish a *prima facie* invidious discrimination case only requires that they prove that such discrimination is *one* reasonable inference, not the “only available” inference. The question should not have been whether segregation was the “only available inference” but rather whether segregation was a sufficiently reasonable inference to warrant shifting the burden to the State to rebut it.

The only way appellants could have satisfied Judge Feinberg's test would have been to raise and rebut every other possible purpose which the legislature might have had in mind. This they could have done only by introducing detailed statistics showing that the composition of the four

districts could not be explained on the basis of any of these possible hypothetical legislative purposes. This test would thus impose a staggering burden upon plaintiffs in a segregation case, and even if they met this standard they might still be faced for the first time on appeal; as are appellants in this case, with the contention that various other inferences might be "available" in the circumstances. (See the State's Motion to Dismiss or Affirm, p. 12).

(3) Judge Feinberg was able to ignore the obvious inference of legislative purpose to be drawn from appellants' proof only by drawing an alternative inference which was wholly outside the record. Judge Feinberg speculated that the purpose of the legislature may have been to classify voters on the basis of "social and economic background," criteria which he did not define and concerning which there was nothing whatever in the record. By thus basing his opinion on a rationale which was neither alleged nor proved by any of the parties, Judge Feinberg made it impossible for appellants to put in issue the highly dubious constitutionality of a classification according to "social and economic background." See *Griffin v. Illinois*, 351 U. S. 12 (1956) and *Gideon v. Wainwright*, 372 U. S. 335 (1963). This criterion is of highly dubious Constitutionality in this case because its use could easily mask deliberate racial segregation. There can be no doubt that in many areas race and place of origin might be inextricably related to some standard of "social and economic" status. See *Gomillion v. Lightfoot*, *supra*, in which the legislature of Alabama could no doubt have created the same forbidden result if it had excluded from the city of Tuskegee all persons of a particular "social and economic background."

(4) Judge Feinberg's opinion assumes the constitutionality of the 1951 statute which was replaced by the 1961 statute herein challenged. On this record, the con-

stitutionality of that earlier statute surely may not be assumed since, *inter alia*, there is no evidence of the racial and group composition of the districts established by that statute at the time it was enacted. Once again, Judge Feinberg's assumption goes entirely beyond the record and has the effect of precluding the plaintiffs from making a record which could rebut it.

(5) Judge Feinberg also grossly misread the factual record. Above all, he failed to consider the various elements of plaintiffs' proof as a whole as required by *Johnson v. Virginia*, *supra* p. 23; but rather discussed each element separately. Further, he assumed that the 17th was expanded by the 1961 statute in a "logical fashion" and that "many combinations of possible Congressional district lines, no matter how innocently or rationally drawn would result in comparable figures" (R. 176). As shown above, the expansion of the 17th was anything but logical since two heavily non-white and Puerto Rican areas which logically should have been added were inexplicably omitted, the only areas which were added included an average of 98% white, non-Puerto Ricans, and the district was kept 12-15% smaller than the other three. The record also shows that no combination of possible Congressional district lines could result in one district with a higher percentage of non-whites and Puerto Ricans and another district with a higher percentage of white, non-Puerto Ricans (without further reducing the population of the already undersized 17th and 18th Districts), than has been achieved by the challenged statute.

II. The Challenged Portion of the Statute Abridged Voting Rights in Violation of the Fifteenth Amendment.

The Fifteenth Amendment, like the Fourteenth, bans segregation of voters into separate voting districts even

absent the loss of a right to vote in the same or similar elections. It is a more specific constitutional guarantee which imposes the same standards in respect of voting rights as are imposed by the Fourteenth in regard to rights of citizens generally. The "separate but equal" doctrine is incompatible with both.

The interchangeability, or co-extensiveness, of the Fourteenth and Fifteenth Amendments is demonstrated by the "white primary" cases (all involving, *inter alia*, Congressional elections). *Nixon v. Herndon*, 273 U. S. 536 and *Nixon v. Condon*, 286 U. S. 73, were decided under the Fourteenth while *Smith v. Allwright*, 321 U. S. 649, (1944) and *Terry v. Adams*, 345 U. S. 461, (1953) were decided under the Fifteenth. In all four cases, exclusion of Negroes from participation in the primary election of a single political party or group was invalidated despite the fact that the plaintiffs were not barred from any other primary and would be free under applicable state statutes to organize their own political party with its own primary. *Smith v. Allwright* and *Terry v. Adams* thus establish that separate but equal Congressional voting constitutes an abridgment within the meaning of the Fifteenth Amendment.

Gomillion v. Lightfoot, 364 U. S. 339 (1960) confirmed that segregation of voters into racially based voting districts may constitute a violation of the Fifteenth Amendment. Despite the court's statement that Negro voters had been "deprived" of their municipal vote, they were, on the facts there presented, no more "deprived" of a vote than the plaintiffs in this case. As was pointed out to this Court (Brief for Respondents, p. 12), the Negroes of Tuskegee were free under applicable Alabama statutes to establish their own separate municipality merely by filing a petition signed by 25 persons. Ala. Code Title 37, art. 6 (1958). Indeed, at the time of the adoption of the statute excluding

the Negroes from Tuskegee, it was proposed that the above statute be amended so as to preclude the Tuskegee Negroes from incorporating a new municipality. But this proposal was not adopted. See Lucas, *Gomillion v. Lightfoot*, SUPREME COURT REVIEW, 194, 210-11 (1961), in which the author also suggests additional reasons for viewing the case as barring any segregation of voters, even absent a technical loss of voting rights.

Nor can it be supposed that *Gomillion* rested upon a hypothetical loss of municipal services. Since the majority decided the case under the Fifteenth Amendment, the only relevant consideration was the effect upon voting rights, and any effect upon rights to governmental services was without constitutional significance. Moreover, the record contained no information concerning municipal services, tax rates, county services, etc. So far as the record showed, the Negro plaintiffs would continue to benefit from municipal services, or benefit from services of the county into which they were placed, where, for all that was in the record, services may have been superior and the tax rates lower.

Even if the "white primary" cases and *Gomillion* are deemed to rest upon an implicit assumption that the voting units into which the Negroes were segregated deprived them of the full vitality of their voting rights, the instant case is indistinguishable. The voting units into which the non-white and Puerto Rican plaintiffs have been placed give them 12-15% less voting power than the voting unit established by the all-white 17th District. And, by singling out non-whites and Puerto Ricans for separate treatment, the challenged statute involves the same sort of inherent inequality condemned in *Brown v. Board of Education* and the cases following it.

Read literally, the Fifteenth Amendment guarantee would apply only to the non-white plaintiffs in this case. However, since the Fifteenth Amendment is merely a more

specific guarantee of rights generally protected by the Fourteenth Amendment, there would be no bar to extending the Fifteenth Amendment guarantee to other classes of citizens, including persons of Puerto Rican origin. "... [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar." *United States v. Classic*, 313 U. S. 299, 316 (1941).

However, even if the Fifteenth Amendment is to be construed literally, it seems clear that its guarantee would be applicable to persons of Puerto Rican origin via the Fourteenth Amendment. See *Nixon v. Herndon* and *Nixon v. Condon*, *supra*. Because the franchise is so basic to all other rights, introduction of discrimination into the electoral framework should be subject to at least the same Constitutional scrutiny as discrimination in courtroom seating, *Johnson v. Virginia*, 373 U. S. 61 (1963).

Appellants' proof, for the reasons discussed above in relation to the 14th Amendment, was sufficient to establish a violation of the 15th Amendment under the foregoing Constitutional standard established by that Amendment.

III. Relief

The appropriate relief in this case would be a decree pursuant to 28 U. S. C. § 2201 declaring unconstitutional the challenged portion of the statute. The lower court would then retain jurisdiction, pending a valid redistricting by the New York legislature within a reasonable time and, failing such action, would conduct further proceedings. The legislature would thus be given an opportunity to correct the evils of the challenged portion of the statute.

Such declaration of unconstitutionality resulted in action by the state legislature in *Baker v. Carr*, see *Baker v. Carr*,

206 F. Supp. 341 (M. D. Tenn. 1962), and in various other cases stemming from this court's decision in that case. See *Smcock v. Duffy*, 215 F. Supp. 169 (D. C., Del., 1963); *Sims v. Frank*, 208 F. Supp. 431 (D. C., Ala., 1962); *Magraw v. Donovan*, 177 F. Supp. 803 (D. C., Minn., 1959). See also *Tombs v. Fortson*, 205 F. Supp. 248 (D. C. Ga., 1962) where the court reserved decision to give the legislature an opportunity to correct the abuses of the existing apportionment statute. After a three judge Federal court found a Colorado apportionment statute unconstitutional, without awarding affirmative relief, *Lisco v. Nichols*, 208 F. Supp. 471 (D. C. Colo. 1962) the voters adopted a new apportionment plan by state-wide referendum. See *Lisco v. Love*, 32 L. W. 2076 (D. C. Colo. 1963).

The New York legislature will have adequate opportunity to enact a law validly redistricting the four Congressional districts of Manhattan prior to the 1964 Congressional elections. The legislature will convene in regular session in January 1964; and the Governor may call a special session of the legislature to enact a redistricting statute, as he did when the statute here challenged was enacted at an extraordinary two-day session.

The Congressmen elected from the four districts whose boundaries are here challenged may hold office until the regular 1964 Congressional elections.* Although elected from a district later-declared to be invalid, they would not lose their *de facto* position, and their acts as Congressmen

*Although the complaint filed July 26, 1962 seeks, *inter alia*, an injunction restraining defendants from conducting the 1962 elections on the basis of the district boundaries of the four Congressional districts in Manhattan, no injunction was issued and the 1962 elections were held while this action was *sub judice*. Consequently, the incumbent Congressmen were elected on the basis of the district boundaries as defined by the challenged portion of the statute.

could not be challenged. See *Sherrill v. O'Brien*, 188 N. Y. 185, 212 (1907); see also *Baker v. Carr*, 369 U. S. 186, 250 (1962) (concurring opinion), stating that "any relief accorded can be fashioned in the light of well-known principles of equity." For example, in the apportionment cases, legislators holding office under invalid apportionment statutes were convened to enact valid statutes. See *Sincock v. Duffy*, *supra*; *Sims v. Frank*, *supra*; *Baker v. Carr*, after remand, *supra*; *Magraw v. Donovan*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded to the three-judge court with instructions to enter a judgment declaring the challenged portion of the statute unconstitutional and for other proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 96

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTAGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York,

Defendants-Appellees,

and

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEES ROCKEFELLER,
LEFKOWITZ AND LOMENZO**

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 96

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Defendants-Appellees,

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Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES ROCKEFELLER, LEFKOWITZ AND LOMENZO

Statute Involved

Extracts from the challenged statute, Chapter 980 of the
New York Laws of 1961, are set forth in the complaint

- (R. 3-6). The statute in question, enacted on November 19, 1961, redistricted New York for the purpose of the 1962 Congressional elections. It was made necessary by the State's loss of two seats in the House of Representatives as a result of the 1960 decennial census. See 2 U.S.C. § 2a.

Questions Presented

1. Was the District Court required to find that New York's 17th Congressional district was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin", where the sole evidence supporting this charge is (1) that a smaller percentage of such citizens resided in the 17th district than in the other three Congressional districts contained within New York County, (2) that the 17th district is the least populous of the four Congressional districts in New York County, (3) that the boundary of the 17th district does not consist solely of straight lines and does not invariably include full census tracts, and (4) that there were other conceivable ways to draw district lines so as to embrace a larger percentage of Negroes and Puerto Ricans in the 17th district?

2. (a) Does a plaintiff attacking a redistricting statute as a product of racial discrimination satisfy his burden of showing unconstitutionality merely by demonstrating that two adjoining Congressional districts in a heavily populated city do not have the same percentage composition of voters classified on a racial basis?

(b) Does such a plaintiff meet his burden of showing unconstitutionality even if he shows that the Legislature was aware that the racial composition of the two adjoining districts was not the same?

3. Do the Fourteenth and Fifteenth Amendments compel a state legislature, in drawing Congressional district lines, to disperse members of a racial minority living in

one neighborhood among two or more districts and forbid it from including the entire neighborhood in one district?

4. Is there a discoverable constitutional standard by which this Court may choose between alternative policies of concentrating a racially homogenous neighborhood in one Congressional district or dividing it among several districts?

5. (a) Can a court of equity draft a workable decree which chooses between these alternative policies?

(b) In order to draft a workable decree which upsets an existing districting statute because of a racial imbalance in the districts, must not a court of equity determine what should be the proper racial composition of each such district?

(c) Would the rights of any racial minority or of the citizens of New York in general be served by a court-ordered election at large of members of the House of Representatives?

(d) May a plaintiff challenging the constitutionality of a state statute obtain relief against the Governor of the state merely because the Governor, as chief executive, has a general responsibility to administer all the laws of that state?

Statement of the Case

A. The Pleadings.

Appellants brought this action seeking a declaration that Chapter 980 of the New York State Laws of 1961 violates the Fourteenth and Fifteenth Amendments of the Constitution of the United States and an order enjoining defendants from enforcing or executing that statute (R. 7-8). Appellants named as defendants various state and local officials who they alleged were under a duty to administer and enforce the statute (R. 2). These officials included

the Governor, Attorney General and Secretary of State* of New York, on whose behalf this brief is filed.

Appellants alleged that they are residents and voters in each of the four new Congressional districts located in New York County (R. 2). They claim that Chapter 980 "establishes irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin"; that the 17th Congressional district was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin and . . . is over-represented in comparison to the other three districts in the County of New York"; and that "the 18th, 19th and 20th Congressional Districts have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York and to be under-represented in relation to the 17th Congressional District" (R. 6). Finally, they charge that "the unconstitutional districting herein complained of has existed for many years" and that the Legislature "has redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perpetuate and aggravate the irrational, discriminatory and unequal districts and the segregation of voters by race and place of origin in the County of New York" (R. 7).

The state officials named as defendants answered the complaint denying all its material allegations and asserting affirmative defenses of lack of jurisdiction, failure to state a claim, improper joinder of the Governor and lack of equity (R. 19-20).

* When this action was begun, Caroline K. Simon was Secretary of State of the State of New York and was named as a party defendant. After this appeal was taken, John P. Lomenzo became Secretary of State and, accordingly, we have revised the title of this action to indicate that fact. See Rule 48, Revised Rules of the Supreme Court of the United States.

At the opening of the trial, six district leaders of the Democratic party, including Congressman Adam Clayton Powell, intervened in the action and aligned themselves with appellees (R. 13-14, 23-31). In their answer, they denied the material allegations of the complaint and set up various affirmative defenses (R. 15-18). They also alleged that the district lines in question were drawn along partisan political lines rather than racial lines, that the effect of a judgment favorable to plaintiffs would be to deprive Negroes and Puerto Ricans of their present public offices and of fair representation in Congress and that the real parties in interest were not the named plaintiffs but the Democratic County Committee of New York County (R. 16-17).

The local municipal officials named as defendants, represented by the Corporation Counsel of the City of New York, took no active part in the defense of the proceedings (R. 32-33).

B. The Proof

On July 31, 1962, the District Court convened a statutory three-judge Court to consider appellants' claims (R. 11-12, 21-22). This Court heard evidence on August 9th, 15th and 28th, 1962.

Appellants, through the use of maps and other exhibits introduced into evidence, showed the racial composition of the 17th Congressional district and of various census tracts bordering the district (R. 196-215). They also called two witnesses, who had prepared the exhibits, to interpret their contents for the Court (R. 40-105).

At the close of appellants' case, appellees announced that they would present no oral testimony (R. 105). Instead, they introduced in evidence a certificate by the Bureau of the Census showing the composition of the old and new 17th districts (Def. Exh. A, R. 106, 219) and a series of maps of New York County Congressional districts tracing the gradual development of the present

district lines through every redistricting statute since 1911 (Def. Exhs. C-H, R. 131, 233-43).

For the convenience of the Court, we have divided the evidence introduced at the hearing into several major categories. We summarize here, for each of these categories, the salient facts presented by both sides.

1. *Racial composition of New York County*: There are 1,698,281 persons who live in Manhattan Island (New York County).^{*} Of these, 639,692 persons, or 37.7% of the total population, are non-whites or are of Puerto Rican origin (Pl. Exh. 3, R. 46, 203). The great bulk of these persons are concentrated in Harlem—the central northeastern section of Manhattan, where they comprise 75-100% of the population of each census tract (Pl. Exh. 4-B, R. 75, 207). On the other hand, there are relatively few non-whites and Puerto Ricans who live in the 70-80 block area on Manhattan's East Side which is immediately south of Harlem; these persons comprise less than 5% of the census tracts in this area (Pl. Exh. 4-B, R. 75, 207).

The area of Manhattan covers four Congressional districts. The 17th district, which is the focus of the complaint here, takes in the bulk of the eastern and central areas of the island, including the area south of Harlem which has a relatively low concentration of non-whites and Puerto Ricans. The 18th district covers the bulk of the Harlem neighborhood. The 19th district embraces the southern and southwestern portion of the island, and the 20th district takes in the northern and northwestern areas (Def. Exh. H, R. 131, 243).

According to appellants' figures (Pl. Exh. 3, R. 46, 203), the 17th Congressional district contains 19,652 non-whites and persons of Puerto Rican origin, or 5.1% of the total

^{*} New York County actually includes a small part of the mainland, since the boundary between New York and Bronx County does not strictly adhere to the Harlem River. The small mainland strip in New York County is included in the 20th Congressional district (R. 6; Def. Exh. C-H, R. 131, 233-43).

district population of 382,320. The 18th district contains 372,114 such persons, or 86.3% of the total district population of 431,330. The 19th district contains 126,952 non-whites and persons of Puerto Rican origin, or 28.5% of the total district population. The 20th district contains 120,974 such persons, or 27.5% of the 439,456 persons who live in that district.

2. Evolution of the present Congressional districts:

As a result of the 1960 census, New York lost two seats in the House of Representatives (Def. Exh. B, R. 130, 228). Accordingly, the New York Legislature redistricted the State. The redistricting Act provided for contiguous districts whose population could vary no more than fifteen percent from the State average (R. 155-56). As a result of the Act, the area covered by New York County, which formerly had included six Congressional districts, now embraced only four (Def. Exhs. G, H, R. 131, 241-43), and the boundaries of the old districts had to be redrawn.

Except for the necessary expansion of some districts and the elimination of others, the existing pattern of Congressional district lines was little changed by the new Act. The 17th district was expanded on the south to include Stuyvesant Town, a housing development containing 22,405 persons, and a large area on the East Side, between 59th and 89th Streets, containing 101,716 persons (R. 76-77). It dropped 806 persons (R. 86) in a two-block strip from Fifth to Madison Avenues between 98th and 100th streets which was part of a hospital located in an adjoining district (R. 90-92); the old boundary, East 100th Street, no longer existed (R. 85-86). Otherwise, the district lines remained the same (Pl. Exh. 4-B, R. 75, 207). The old 16th and 18th districts were merged into the new 18th district, the old 19th and 20th districts were merged to form the new 19th district, and the old 21st district was expanded to the south to form the area comprising the new 20th district. Wherever possible, existing territorial alignments were preserved (Def. Exhs. G, H, R. 131, 241-43).

The districting pattern, except for necessary changes to assure equality of population, remained remarkably similar to that which was created by the 1941 redistricting (Def. Exh. F, R. 131, 239). On the whole, the 17th district retained the same contours throughout this period.

3. Role of race in the evolution of the present districts:

Although the complaint charged that "the unconstitutional districting herein complained of has existed for many years" (R. 6) and that the Legislature, in enacting successive statutes establishing Congressional Districts in the County of New York, "has redrawn the boundaries of such districts in accordance with shifts in non-white population and population of Puerto Rican origin so as to perpetuate and aggravate . . . the segregation of voters by race and place of origin . . ." (R. 7), the record is barren of any evidence of the role of race in the evolution of the present districts. Appellants state that it "seems quite likely" that their allegations regarding the racial motivation of past districtings are true, but that they "did not find it necessary" to obtain the "extensive statistical data" that would be necessary to prove those allegations (Br., p. 27).

4. Racial changes in the 17th district caused by the 1961 redistricting: There are more Negroes and persons of Puerto Rican origin in the new 17th district than there were in the old district (Def. Exh. A, R. 106, 219). However, because the expanded 17th district took in a large area from the East Side of Manhattan with a relatively low concentration of such persons (Pl. Exh. 4-B, R. 75, 207), the percentage of Negroes and persons of Puerto Rican origin in the district dropped from 6.6% in the old district (R. 104) to 5.1% in the new district (Pl. Exh. 3, R. 46, 203).

The only three changes affecting the 17th district made by the 1961 redistricting involved areas in which there

are almost no Negroes or Puerto Ricans. The two neighborhoods added, Stuyvesant Town and the East Side area between 59th and 89th Streets, are, respectively, 99.5% and 97.3% white non-Puerto Rican (R. 77). The hospital area on the north, dropped from the district, is 55.5% white non-Puerto Rican (R. 86).

5. Racial composition of areas bordering the 17th district:

(a) *Northern border*—In general, there is a greater concentration of Negroes and persons of Puerto Rican origin to the north of the 17th district than within it (R. 52-66).

However, there is a large area consisting of two census tracts to the north of the 17th district which contain a smaller concentration of Negroes and persons of Puerto Rican origin than is found in the 17th district. This area, immediately adjacent to the 17th district, extends from Third Avenue to the East River and from 89th Street up to 94th Street, west of First Avenue, and up to 99th Street, east of First Avenue. Like many of the tracts in the 17th district to its south, its population is less than 5% Negro and Puerto Rican (R. 92-93, 99; Pl. Exh. 4-B, R. 75, 207). The area contains 10,507 persons (R. 99).

Since the presence of these two tracts adjacent to the 17th district showed that the district could have been expanded without adding to the concentration of Negroes and persons of Puerto Rican origin in it, appellants attempted to rebut the force of this evidence. They produced a letter from the New York City Housing Authority (Pl. Exh. 7, R. 120, 217) showing that, in 1959, a low-cost housing project was planned for the area between 93d and 95th Streets, east of First Avenue; the letter noted that Negroes and Puerto Ricans made up a majority of the tenants in the 28 projects that were already operating in Manhattan. The letter also indicated that at some unascertained time after the original project was planned, an extension was planned; its "tentative boundaries, which are

still being studied" (emphasis in letter), are from 91st Street to 93rd Street, east of First Avenue. The letter did not indicate the date on which the plan to build an extension was formulated or the date on which it was made known; specifically, it did not indicate whether that proposed plan could have been before the Legislature when it passed the 1961 redistricting statute.

The letter also failed to indicate that there would be any change in the blocks between 89th and 91st Streets and 95th and 99th Streets, east of First Avenue, which are part of the same virtually all-white non-Puerto Rican census tract as are the blocks discussed in the letter. Neither did it indicate that there would be any projects built in the adjoining and much more populous tract between First and Third Avenues—where most of the 10,507 persons in the area under discussion live.*

(b) *Southern border*—There are many census tracts south of the southern boundary of the 17th district which have low concentrations of non-whites and persons of Puerto Rican origin (R. 100; Pl. Exh. 4-B, R. 75, 207).

A tract which takes in part of the southern boundary of the district, extending between Broadway and the Bowery south of 4th Street, is 12.6% Negro and Puerto Rican in the portion which is outside the district and 8.2% Negro and Puerto Rican within it (R. 69).

On the other hand, a triangular tract north of it, within the 17th district but adjacent to its boundary line, is 35.9% Negro and Puerto Rican (R. 74; Pl. Exh. 4-B, R. 75, 207).

* The tract discussed in the letter (Tract 152) contains 2,664 persons. The tract to its west (Tract 154), apparently not covered by the City's plans for a housing project, contains 7,843 persons. U. S. Bureau of the Census, *U. S. Censuses of Population and Housing: 1960 Census Tracts, Final Report PHC(1)—104, Part I, Table F-1 (1962)*.

And the tract to the west of Stuyvesant Town, which is adjacent to the district but not included within it, is 12.2% Negro and Puerto Rican (R. 88; Pl. Exh 4-B, R. 75, 207).

(c) *Western border*: From 14th Street to 26th Street, the areas west of the western border of the 17th district generally have a somewhat higher percentage of Negroes and Puerto Ricans than do the adjoining areas within the district (R. 70-71). However, in the border tract between 26th and 30th Streets, 71.2% of the population of the tract who live within the district are non-whites or persons of Puerto Rican origin whereas only 48.7% of the tract's population living outside the district are Negroes or Puerto Ricans. Such persons number less than 5% of the population on either side of the border tract which extends from 30th to 34th Street (R. 71; Pl. Exh. 4-B, R. 75, 207).

From 34th to 50th Streets, the areas, within the 17th district and bordering on its western border, totalling 6,397 persons, are generally more heavily Negro and Puerto Rican than the areas adjoining them that are not included within the district (R. 71-72, 103; Pl. Exh. 4-B, R. 75, 207). The concentration of Negroes and Puerto Ricans in this area varies from 27.1% (R. 102) to somewhere between 15-20% (R. 72). The border area between 50th and 54th Street, within the district, contains 1,573 persons of whom 10-15% are Negro or Puerto Rican (R. 72).

The portion of the western boundary of the district which lies between 54th and 73d Street consists of a series of split census tracts (Pl. Exh. 4-B, R. 75, 207): In some of these, there is a somewhat greater concentration of Negroes and Puerto Ricans outside the district than in it (R. 73-74). On the other hand, in the border tract which lies between 62nd Street and 66th Street, 783 Negroes and Puerto Ricans live inside the district while only 7 of these persons live outside the district; in percentage figures, 16.6% of the tract's population within the district is Negro or Puerto Rican, while 7.8% of the tract's population not in the district is composed of these persons (R. 73).

In sum, if one were to straighten the western boundary of the 17th district by continuing the Central Park West line all the way down through Eighth Avenue, and therefore eliminate any turns or split census tracts, the district's racial composition would remain almost exactly the same; 2,830 Negroes and persons of Puerto Rican origin would no longer be within the district, while 2,888 such persons would come into the district. The only significant result would be that the 17th district would suffer a net loss of about 19,000 persons who now live within its borders (R. 80-82).

6. *Hypothetical expansions of the 17th district*: Appellants also introduced in evidence hypothetical expansions of the 17th district on its northern and southern boundaries, respectively. These showed: (a)—If Stuyvesant Town were dropped from the district, the western border straightened, and the district expanded into Harlem so as to make up for the dropped population and to bring the entire population of the district up to 425,014, the expanded district would contain 59,486 Puerto Ricans and Negroes, whereas it now contains 19,652 such persons (R. 82-83). (b)—If the northern boundary of the district ran straight across East 98th Street east to Third Avenue, and the rest of the district were expanded so as to take in the census tracts south and west of Stuyvesant Town, there would be 36,134 Negroes and persons of Puerto Rican origin in the expanded district, or 8.5% of the total expanded population of 427,351 (R. 86-87).

7. *Hypothetical redistrictings of New York County*: Appellants also presented three hypothetical districtings for Manhattan "with relatively equal total population and trying to make the boundary lines and the pattern as simple as possible" (R. 88, Pl. Exh. 6; R. 90, 211-215).

The first of these envisioned districts dividing the island into northern, southern, east-central and west-central dis-

tricts. The northern district contained 59.1% Negroes and Puerto Ricans; the western, 37.1%; the eastern, 32.2% and the southern, 22.3% (R. 88, 211).

The second hypothetical districting was a variation of the first; in which the northern and southern districts remained the same but the center of the island was divided into a south central and a north central district, containing 9.5% and 58.9%, respectively; Negro and Puerto Rican persons (R. 89, 213).

The third hypothetical districting envisioned northwest, northeast, southwest and southeast districts, whose Negro and Puerto Rican inhabitants comprised, respectively, 53.8%, 43.0%, 31.6% and 22.4% of the population (R. 90, 215).

C. Request for Stipulation.

After the close of the hearing, the Court requested the parties to stipulate to population, voting and enrollment figures for the two areas added to the 17th district in 1961—Stuyvesant Town and the East Side strip running from 59th to 89th Street—and for certain areas immediately adjoining those added to the district. Appellees promptly furnished these figures, but appellants objected to the use of this material.* The Court, instead of taking judicial notice of these figures, declined to consider the information supplied by appellees as part of the record before it (R. 175-76).

D. Opinions Below.

On November 26, 1962, the three-judge District Court dismissed the complaint. 211 F. Supp. 460 (S.D.N.Y. 1962). Each of the three judges wrote separate opinions.

* Appellants filed a memorandum of their objections with the District Court. It appears on pages 516-30 of the original record certified by the Clerk of that Court.

Judge Moore pointed out that appellants offered no proof "that the specific boundaries created by Chapter 980 were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts" (R. 153). He noted that the redistricting was necessary due to the reduction in New York's Congressional delegation from 43 to 41 representatives (R. 153) and that New York County's proportional share of the state's total representation was four seats (R. 157). New York's legislature adheres to the recommendation of the American Academy of Political Science that Congressional district lines be based on an ideal of substantial equality of population, with a maximum variation of 15% from average population per district (R. 156). In light of this, Judge Moore noted that the 17th district is less than 7% below the average population in the state and that appellants' reference to this district as "over-represented" is inaccurate (R. 157-58).

Since there could be no legitimate claim that the districts were disparate in population, Judge Moore concluded that appellants actually support a "racial percentage theory" (R. 159)—claiming that the Constitution requires New York to divide its Congressional districts so as to include the same ethnic ratios in each of the four districts in New York County—while the intervenors claimed that the adoption of such a theory would itself be violative of the Constitution. Noting that the Legislature redistricted New York County preserving the general pattern of past districting acts, and that there was no proof of any previous history of racial discrimination (R. 163), and pointing out that it is not unusual to find persons of the same race or place of origin settling together within a large city (R. 164), Judge Moore held that "to create districts based upon equal proportions of the various races inhabiting metropolitan areas would indeed be to indulge in practice verging upon the unconstitutional" (R. 164) and voted to dismiss the complaint.

Judge FEINBERG concurred in the order dismissing the complaint on the ground that appellants did not meet their burden of proof (R. 171). He stated that segregated districts would be unconstitutional (R. 173), but held that inferences other than racial segregation "are equally or more justifiable" (R. 174) from the evidence submitted by appellants and, therefore, that appellants had not sustained their burden of proof. First, Judge FEINBERG pointed out that the Legislature, in eliminating two districts from New York County to correspond with the census results, "had moved the lines in a rational manner", resulting in "straighter and apparently more logical congressional lines than before" (R. 174). Nor did he find any proof that the lines were drawn in past years for discriminatory purposes (R. 174). Second, Judge FEINBERG rejected appellants' contention that the 17th district was kept small in population so as to avoid incorporating a higher percentage of non-white or Puerto Ricans, noting that "a variation of only 7 per cent from average does not . . . justify a finding of racial discrimination" (R. 175). Third, he disagreed with appellants' argument that the only available inference from the ethnic composition of the districts is one of a discriminatory legislative intent. The obvious inference, as he pointed out, is that non-whites and Puerto Ricans live in certain concentrated areas; indeed, under one of appellants' suggested plans, one district would have 9.5% non-white and Puerto Rican population, while another would have 59.1% non-white and Puerto Rican (R. 176). Failing proof of "failure to build upon prior lines in a rational, logical manner, a greater population disparity and an increase in boundary zig-zagging" (R. 176), Judge FEINBERG held that appellants had not proved their case.

Judge MURPHY dissented, believing that this Court's decision in *Hernandez v. Texas*, 347 U. S. 475 (1954), required him to find that appellants proved a prima facie case even though he found "a total absence of direct proof

of any specific intent by the New York Legislature" (R. 165) and did not believe that mere showing of population disparity and non-straight boundary lines (R. 165) would show such an intent. To him, the population figures alone amounted "to a mathematical demonstration that the legislation was solely concerned with segregating white, colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" (R. 167). He favored giving judgment for appellants declaring that the challenged portion of Chapter 980 is unconstitutional.

Summary of Argument

I.

A. Assuming, arguendo that appellants stated a colorable claim under the Constitution, they bore the burden of showing that the Legislature deliberately and purposefully drew the lines of the 17th district so as to minimize the number of Negroes and persons of Puerto Rican origin voting in that district. Unless they established that the Legislature intentionally "segregated" the voters in the adjoining 17th and 18th districts, they could not possibly show any violation of the Constitution. *Snowden v. Hughes*, 321 U. S. 1 (1944).

It is fallacious to argue, as do appellants, that the Constitution prohibits even an unintentional pattern of "segregation" in voting districts. First, their argument fails to take into account the facts that persons of similar ethnic backgrounds often settle in the same neighborhood in large cities, thereby causing variations in the ethnic composition of adjoining Congressional districts. Such a situation is commonplace, and raises no inference of unconstitutionality. Second, their argument, if adopted, would require the Legislature to use race and national origin as bases for drawing Congressional district lines so as to assure that each district would have the proper "mix" of the

racess. It would in fact force rather than forbid the use of race and national origin as criteria in districting.

B. In order to demonstrate prima facie that the Legislature used race and national origin as criteria in drawing district lines, appellants had to show an absence of any other substantial purpose for the districting. *McGowan v. Maryland*, 366 U. S. 420, 459, 468 (1961) (FRANKFURTER, J., concurring). In other words, they had to show that race was a more likely basis for the district lines than were other, more usual, bases of districting.

In light of this standard, their proof fell far short of the mark. The circumstance that there was a disparity in the racial composition of the 17th and 18th districts merely reflected living patterns in the City. In fact, in one of appellants' own hypothetical districtings, a district which was 9.5% Negro and Puerto Rican adjoined a district in which these persons made up 58.9% of the population. Moreover, they were unable to show that the 17th district could not be expanded or straightened without significantly altering its racial homogeneity. The evidence adduced at trial showed that it would be possible to add to the 17th district two census tracts on the northern border containing more than 10,000 persons and to add other census tracts on the southern border without increasing the percentage of non-whites or persons of Puerto Rican origin in the district. The evidence also showed that there were many border tracts within the district with a relatively heavy Negro and Puerto Rican concentration. Since a Legislature bent on excluding these persons from the district would not have included these tracts, it is obvious that the Legislature had no such attitude.

Neither could appellants' reliance on the history of the 17th district give them any comfort. The one area removed by the 1961 redistricting Act from the old 17th district was occupied by a hospital whose property spanned the border

of the district; the old boundary street no longer existed. The only two additions to the district—Stuyvesant Town and an area on the East Side of Manhattan—were made in order to expand the district boundaries in view of the fact that New York County's representation in the House of Representatives had been reduced from 6 to 4 members.

Nor did appellants' diagrams of hypothetical districts lend support to the strength of their claim. These diagrams, using full census tracts and major streets as "reasonably objective criteria" for district lines, bore no relation to any of the traditional factors which determine the boundaries of a Congressional district. If anything, the diagrams merely proved that there is nothing unnatural about the disparity in concentration of Negro and Puerto Rican voters between the 17th and 18th districts; appellants' hypothetical districts themselves had disparities which were very wide. Unlike the jury exclusion cases—where members of a particular race were not called for jury service over the course of several decades—and unlike *Gomillion v. Lightfoot*, 364 U. S. 339 (1960)—which involved a redrawing of the boundaries of the city so as to deprive all save four or five of its 400 Negro voters of their franchise—the "segregation" produced by New York County's Congressional districting is merely commonplace.

In sum, appellants utterly failed to present any evidence which suggested that the boundaries of the 17th district were drawn to keep Negroes and Puerto Ricans outside the district.

C. Even if appellants had presented a prima facie case, any inference of unconstitutionality would have been rebutted by a series of maps introduced by appellees showing the evolution of the present 17th district in past districting statutes. These maps showed that there was an effort to preserve existing territorial alignments in the 1961 redistricting Act. With the exception of the three necessary changes outlined above, the 17th district

retained the same contours under the 1961 redistricting as it had during the previous decade.

There is no evidence in the record that casts any taint upon the previous districting Acts. In fact, although appellants, in their complaint, charged that past redistrictings were motivated by racial considerations, they presented no evidence at all to this effect at the trial. In the absence of any such evidence, there is no reason to suspect the constitutionality of the past Acts.

Therefore, appellees showed that the 1961 Act was motivated not by racial considerations but simply by a desire to preserve previously existing district patterns of unchallenged validity.

II.

A. Appellants' assumption that it is unconstitutional for the Legislature to consider the racial composition of a neighborhood in drawing district lines is unfounded. Under well settled constitutional principles, it is assumed that all relevant facts are before the Legislature when it acts. Therefore, when the Legislature redistricts an area in which there are neighborhoods of differing ethnic composition—or even when it chooses not to redistrict existing district lines in such an area—it is making some kind of decision on the proper distribution of the ethnic groups in such neighborhoods among the various districts. The plain fact is that the Legislature not only may "consider" the fact of race but that it cannot possibly avoid doing so.

B. In weighing the racial considerations which necessarily arise in the course of redistricting, the Legislature is not controlled by any per se rule of constitutional law barring it from giving controlling effect to these concentrations. The Fourteenth Amendment does not relegate a state to a passive role in race relations. On the contrary, it leaves the state free to encourage progress in the field,

even if this requires that the state classify people by race. For example, we believe that a state may deliberately zone a school district to assure a proper racial "mix" of students and avoid de facto segregation. Any other view simply would prevent enlightened state action in the field of race relations.

C. A State Legislature, consistent with the Constitution, may decide to concentrate a racially homogeneous neighborhood in one Congressional district instead of dividing it among several districts. The Legislature, in drawing the district lines, necessarily must either concentrate or dilute a minority vote in an area which contains two or more racially homogeneous neighborhoods. A rule of law which prevents concentration of a minority in one district would, in effect, impose an unjustifiable requirement that the minority be dispersed among several districts.

Moreover, it is consistent with the purpose of the single member-district system for the Legislature to concentrate a racial minority in one district instead of diluting its power over several districts. Such a minority, concentrated in one district, is able to advance its interests through a Congressman responsive to its wishes.

D. This analysis is applicable to appellants' claims under both the Fourteenth and Fifteenth Amendments. In the context of the case at bar, these two provisions are co-extensive in their protection of the right to vote. Both provisions guarantee voting equality, but neither provision immunizes a neighborhood containing a racial minority from the normal vicissitudes of districting.

III.

A. The complaint fails to state a justiciable issue, since there is no discernible standard by which this Court, in reviewing Congressional districting statutes, may choose between the alternative policies of concentrating or divid-

ing racially homogeneous neighborhoods. *Baker v. Carr*, 369 U. S. 186 (1962).

There is, of course, no such thing as a "neutral" Congressional district line. Any line drawn in an area which contains a heavy concentration of a particular minority necessarily concentrates the residents of that area in one district or divides them among two or more Congressional districts.

The same is true of school districts. There, too, any district line that is drawn cannot be "neutral." It must affect, one way or another, the racial composition of the school. In the case of the school district, however, there is a fixed constitutional desideratum—integration—by which the Courts may judge the district lines. *Branche v. Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962).

In the case of the Congressional district, however, there is no such discernible standard. The Courts have no touchstone for deciding when a minority is better off by having its voters concentrated in one neighborhood and when it gains an advantage by being divided among several districts. Neither can they decide when the minority has achieved a "fair" balance of voting power and when the balance has swung too far towards minority rule. These are matters of political rather than judicial judgment. Their determination is part of the politics of the people and is alien to the Courts.

B. Even though the federal Courts lack standards by which to review such questions as are raised here, the states are subject to Congressional scrutiny to guarantee that they do not abuse their districting powers.

Pursuant to Article I, §§ 4-5 of the Constitution, the Congress may review the discretion of state legislators in setting up Congressional districts. This may be done either by a Congressional enactment of general statutory standards or by the refusal of the House of Representatives

to seat a Representative whose district lines do not conform to acceptable standards.

The legislative history of these two sections shows clearly that the framers of the Constitution contemplated that the Congress would exercise a federal review over state regulation of Congressional districts. In fact, Congress repeatedly has exercised its power to establish standards for districting and the House of Representatives has on several occasions entertained challenges to the seating of a member on the ground that his district did not conform to required standards. The Congress clearly has adequate powers to prevent any state from using its districting functions to the disadvantage of minority groups.

IV.

A. Relief should be denied under settled principles governing the exercise of equitable discretion, since there are no standards by which an equity Court could fashion relief in this action. The same problems which render this issue nonjusticiable also prevent formulation of a coherent decree. Since there is no judicial standard for determining what is a sufficiently "integrated" Congressional district, there can be no workable decree giving appellants the relief they seek.

Any such decree would be self-contradictory as well as vague. Since appellants have objected to the relatively low concentration of Negro and Puerto Rican voters in the 17th Congressional district, any relief presumably would involve an expansion of the 17th district to take in a greater number of such voters. However, appellants also argue that all classifications of persons by race are forbidden. If this latter premise is adopted, the equity decree itself—which would add voters to the 17th Congressional district solely because of their race—would be violative of the Constitution. This contradiction is inherent in appellants' theories, and it blocks the drafting of any decree that could implement their theories.

B. Equity should also decline to act here because the harmful effects of any decree would far outweigh the beneficent ones.

Such a decree ultimately would require that an election at large for Congressmen be held throughout the state; there is no statutory basis for appellants' suggestion that an election at large could be confined to New York County. The applicable statute, 2 U.S.C. § 2a (c) (5), requires that such an election be held where a state has lost representation but has failed to enact a valid districting measure to govern the new situation. New York would be in that position if the statute here challenged were declared unconstitutional. The election at large is contrary to the prevailing policy of Congress and would result in drastic changes in our politics. It would be especially inappropriate in this case, where the entire proof concerned a disparity in racial composition between the constituencies of only two districts of the 41 Congressional districts in New York which would be affected by any decree.

Moreover, it appears that the rights of appellants themselves would not be furthered and would doubtless be harmed by the relief here sought. An election at large would diminish and perhaps altogether eliminate the influence of the Negro and Puerto Rican voters of New York County.

C. In any event, no relief should issue against the Governor of the State, who has no connection with this action. The Governor here, like the President of the United States with respect to a federal statute, has a continuing obligation to take care that all the laws in his jurisdiction be faithfully executed. However, this overall supervisory power in a chief executive does not make him a proper party to all cases challenging these laws. Appellants may have perfectly adequate relief, if otherwise entitled thereto, by proceeding against subordinate officers charged with enforcing the statute.

POINT 1

Appellants failed to prove that the Legislature used race and national origin as criteria for determining the boundaries of the 17th Congressional district.

We shall show in this section of our brief that appellants have not even come close to proving their charge that the 17th Congressional district was "contrived" (R. 6) to exclude non-white citizens and citizens of Puerto Rican origin. For the purpose of this section only, we assume *arguendo* that appellants have stated a colorable claim under the Constitution.

We argue, first, that appellants bore the burden of proving that the Legislature deliberately employed race and national origin as criteria in drawing the district lines, and we take issue with their attempts to shy away from this burden. Then, we demonstrate that appellants did not make a *prima facie* case; in fact, their evidence is inconsistent with the notion that the Legislature strove to minimize Negro and Puerto Rican influence in the district. Next, we point out that, in the light of appellees' evidence showing the historical development of the 17th district, even a *prima facie* case would have to be supported by evidence that past districtings, too, were constitutionally tainted. Appellants here, in our view, presented neither a *prima facie* case nor the requisite proof to rebut appellees' evidence, even though they bore the ultimate burden of persuading the Court of the truth of their allegations. On this record, there is every reason to infer that the Legislature used criteria other than race and national origin to draw the lines of the 17th district.

A. Appellants bore the burden of showing that race and national origin were the criteria for determining the district boundaries.

The burden on one attacking a statutory classification is to show that it "does not rest upon any reasonable

"basis, but is essentially arbitrary." *Morey v. Doud*, 354 U. S. 457, 464 (1957). See *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 584 (1935). Yet, after alleging—and apparently attempting to prove—that the Legislature intended to restrict the boundaries of the 17th district to avoid taking in Negro and Puerto Rican voters, appellants now argue that they were not obliged to prove that the Legislature intended to create segregated districts (Br., p. 31). Their first line of attack is that even an unintentional pattern of "segregation" of voters by race or national origin is prohibited by the Constitution. Therefore, they maintain, a mere showing of a considerable disparity between the ethnic composition of adjoining Congressional districts should be sufficient to establish a prima facie case.

The fallacies of this theory are apparent. First, it fails to take into account the plain fact that persons of the same ethnic background tend to settle close to one another in large urban centers. The reasons for this phenomenon are legion, and they range all the way from the minority group member's desire for security to the existence of discriminatory patterns in housing. New York City is certainly no exception to this phenomenon—indeed, Harlem is known throughout the world as a center of the Negro and, more recently, Puerto Rican communities. It is certainly no surprise to find that different ethnic compositions of neighborhoods in a metropolitan center should be reflected in that area's Congressional districts. In effect, appellants are contending that they may satisfy their burden of proof by showing a commonplace situation which, we believe, exists in nearly every one of our major cities. Second, if appellants' theory is adopted, the Legislature would be forced to use race and national origin as bases for drawing Congressional district lines so as to assure that each district would have a proper "mix" of the races. Otherwise, it would run the risk of establishing

districts which had constitutionally impermissible—or at least constitutionally suspect—racial mixtures. Thus, under the “effect” theory, appellants really would mandate rather than forbid the use of race or similar factors in drawing district lines.

The Constitution countenances no such theory. In most contexts, it is clear that only an “intentional or purposeful discrimination” between persons or classes establishes a violation of the Fourteenth Amendment. *Snowden v. Hughes*, 321 U. S. 1, 7-8 (1944). For example, one cannot establish that there has been racial discrimination in the selection of a jury simply by showing that no Negro sat on a particular jury. *Id.* at 9. To say otherwise would be to mandate that Negroes sit on every jury. Likewise, it would be improper to allow appellants to establish that there has been discrimination in the drawing of Congressional district lines merely because there are comparatively few Negroes and Puerto Ricans in that district. To say otherwise would be to mandate that the Negro and Puerto Rican citizens of a state or city be apportioned in equal numbers among the Congressional districts of that area. Obviously, the Fourteenth and Fifteenth Amendments lend no support to such a view. It is true that in the special instance of school districts it has been argued that even de facto segregation violates the Constitution. *Brånche v. Board of Education*, 204 F. Supp. 150 (E.D.N.Y. 1962). However, in the case of a school district “the central constitutional fact is the inadequacy of segregated education,” *id.* at 153, and there can be no objection to enforced integration. In the context of a jury box or a Congressional district a mandate to “integrate” would bear no relation to any legitimate constitutional standard and would merely create a quota system without rhyme or reason.

At the very least, therefore, it was up to appellants to show that the Legislature deliberately and purposefully

drew the lines of the 17th district so as to minimize the number of Negroes and persons of Puerto Rican origin voting within it.

B. Appellants failed to present a prima facie case.

To present a prima facie case of racial discrimination, appellants had to show an absence of any substantial purpose other than the purpose to classify voters by race. *McGowan v. Maryland*, 366 U. S. 420, 459, 468 (1961) (FRANKFURTER, J., concurring). Cf. *id.* at 426. In other words, they had to establish that race is the more likely basis than the commonly known and expected bases of districting. Note, 72 Yale L. J. 1041, 1059 (1963).

Appellants argue primarily that they made out the necessary prima facie case by showing that the Legislature "could not have created a more segregated pattern in the congressional districts of Manhattan" (Br., p. 21). They rely on four avenues of proof to demonstrate this.

First, they say that the sharp disparity in racial composition of adjoining districts "requires an inference" that race was the basis of the districting (Br., p. 23). We believe that this statement requires little comment. As we have pointed out, the racial composition of adjoining districts may very well reflect the tendency of minority groups to live together in one part of a large city. In fact, in one of appellants' own hypothetical districtings, a district which is 9.5% Negro and Puerto Rican adjoins one in which these persons make up 58.9% of the population (R. 89).

Second, they state that the boundaries of the 17th district, the smallest district in New York County, could not be expanded or straightened without significantly altering its racial homogeneity (Br., p. 24). This statement, too, is not borne out by the record. As we pointed out in our summary of the evidence adduced at trial, it would be

possible to add 10,507 persons on the north (R. 92-93, 99)* without increasing the percentage of non-whites or persons of Puerto Rican origin in the district. Similarly, it would be possible to add many census tracts south of the district's southern boundary which have a low concentration of such persons (R. 100). Moreover, on both the southern and the western borders, there are many instances where areas included within the 17th are more heavily Negro and Puerto Rican than areas adjoining them which are not within that district (R. 71-74, Pl. Exh. 4-B, R. 75, 207). A venal Legislature would almost certainly have included the areas of lower concentration or excluded the areas of heavier concentration of these voters. Indeed, the most plausible inference to be drawn from a review of the possibilities for expanding the district is that the Legislature had no fixed attitude toward race at all.

Furthermore, there is no need on this record even to consider the effect of possible expansion of the 17th district, since it is not underpopulated as it now exists. The New York State Legislature, despite the absence of a Congressional standard (*Wood v. Broom*, 287 U. S. 1 [1932]), has adhered voluntarily to a maximum variation of 15% from average population per district, the variation recommended by the American Political Science Association and endorsed by former President Truman. N. Y. Legislative Document No. 45. (1961); Hearings, Standards for Congressional Districts, H. R. Comm. on the Judiciary Sub-Comm. No. 2, 86th Cong. 1st Sess., pp. 28, 31, 36 (Serial No. 10, June 24 and Aug. 19, 1959); Hacker, Congressional Districting 65 (1963). The four Congressional districts in

* In their brief (p. 26), appellants repeat the assertion that this area is scheduled for construction of a public housing project. As we point out in our summary of the evidence, it is uncertain whether the plans were before the Legislature when it enacted the instant statute. In any event, the project plan takes in only a small part of the area here described (Pl. Exh. 7, R. 120, 217).

New York County show an even smaller variation. The average population per district throughout the State is 409,326; the allegedly "over-represented" 17th district has 382,320 inhabitants—a variation of less than 7% from the average. The most heavily populated of the three other districts, the 19th district, has 445,175 inhabitants—a variation of about 9% from average. The most stringent Congressional standard that has been proposed is a maximum 10% deviation from average; even this has been attacked by the most ardent advocates of population equality as being too stringent. Hearings, *supra*, p. 19. Thus, the slight disparities in population among the New York County districts would pass muster under the sternest proposals yet made for Congressional action.

Third, appellants state that the history of the 17th and 18th districts bears out their contentions. They harp, for one thing, on the fact that a two-block area was "inexplicably removed" in 1961 from the 17th to the 18th district, and suggest this was done because there was a relatively heavy concentration of Negroes and Puerto Ricans there (Br., p. 27). As we showed in our review of the evidence, there was nothing "inexplicable" about the "removal". It was done because the area had come to be occupied by a hospital whose property spanned both districts (R. 90-92). In fact, the old district boundary line, East 100th Street, had disappeared from the face of the map (R. 85-86). Appellants also take comfort, for some unascertainable reason, in the fact that the Legislature in 1961 added Stuyvesant Town to the 17th district, but did not include an area immediately to the west of it which they say is "more logically contiguous" to the 17th district (Br., p. 27). That area—which is no more or less contiguous to the rest of the district than is Stuyvesant Town—contains a population which is 12.2% Negro and Puerto Rican (R. 88). The record shows that there are many tracts on the border of the 17th district—where the Legislature could have omitted them from the district, if it chose to do so—

which, although included within the 17th district, have a concentration of Negroes and Puerto Ricans equal to and in many cases much greater than that in the area west of Stuyvesant Town (R. 71-74). One of these tracts is just north of the area in question, and is 35.9% Negro and Puerto Rican (R. 74).

Fourth, appellants argue that they proved a prima facie case by "drawing hypothetical district lines"—on the basis of "reasonably objective criteria"—resulting in districts which disperse Negro and Puerto Rican voters among the districts so as to create less ethnic homogeneity than exists in the present district (Br., p. 28). The only two "reasonably objective" criteria which they used, other than a rough population standard, are "full census tracts" and "major streets" (Br., pp. 28-29), although they do not indicate why these have any special claim to the favor of the Legislature. They showed no relation of their proposed plans to any of the traditional factors which have motivated legislative districtings. Cf. *Baker v. Carr*, 369 U. S. 186, 266, 323 (1962) (FRANKFURTER, J., dissenting). And—we again repeat—one of their proposed districtings contained adjoining districts with a Negro and Puerto Rican concentration of 9.5% and 58.9%, respectively (R. 89). If appellants' hypothetical districtings proved anything, they proved that racially homogeneous neighborhoods in Manhattan are a fact of life, and that disparities in ethnic composition of the island's Congressional districts reflect that fact rather than any sinister cabal to deprive minorities of their rights.

Appellants make but one further argument to support their contention that they produced sufficient evidence to make a prima-facie case. In tacit recognition of their failure to show that the Legislature "could not have created a more segregated pattern" in the 17th district (Br., p. 21), they maintain that the burden of producing evidence was on the State rather than on them (Br., p. 32). As authority for this unique contention, they cite *Hernandez v.*

Texas, 347 U. S. 475 (1954), and *Gomillion v. Lightfoot*, 364 U. S. 339 (1960).

Neither case lends any support to appellants' position.

The *Hernandez* case states the obvious proposition that the trier of fact can infer that there has been racial discrimination in selection of jury panels where members of a particular race, some of whom were shown to be qualified for jury service, were not called for jury service but consistently ignored over the course of several decades. Appellants' bizarre reading of *Hernandez* proves too much; under it, they would likewise succeed in making a prima facie case on the barest statistical showing in virtually every large city in the union. There is no reason to suspect unconstitutionality from a commonplace showing of minority-group concentration in one neighborhood of a large city.

Nor does appellants' attempted reliance on *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), bolster their cause. *Gomillion* involved an attempt to alter the boundaries of a city in such a way as to remove all save four or five of its 400 Negro voters while not removing a single white voter or resident, *id.* at 341, thus depriving these voters of the benefits of residence in that city, including the right to vote in municipal elections. This, the Court noted, "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering" (364 U. S. at 341)—language borrowed by appellants in the instant case—and the Court went on to state that the allegations (taken as true, since *Gomillion* came up on a motion to dismiss) were "tantamount for all practical purposes to a mathematical demonstration that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." And, against the claim, the city authorities were unable to suggest any legitimate function for the redrawing of the municipal boundaries. *Id.* at 342. In this case we have the very opposite of the *Gomillion* situation. The justification for the redistricting is clear; it was made necessary by New York's loss of two

Congressional seats as a result of the 1960 census. The mathematics of the redistricting is not at all startling; in fact, as we have already pointed out, a large number of non-whites and persons of Puerto Rican origin were added to the 17th district and many white non-Puerto Rican areas are adjacent to the district but not included in it. Most important, appellants suggest no reason why anyone would prefer to exclude these voters from the 17th district only to include them in an adjoining district. This is a far cry from the *Gomillion* situation, where the city authorities, by excluding Negro voters from the boundaries of Tuskegee, were able to disenfranchise them in municipal elections.

Appellants' argument that the burden of proof ought to shift to the State because "it is in a better position to adduce evidence of legislative purpose" (Br., p. 32) is neither elaborated by them nor understood by us. If true, it would apply in every case where a state statute's constitutionality is attacked—and this is surely not the law. See, e.g., *McGowan v. Maryland*, 366 U. S. 420, 426 (1961). Moreover, there is no special information which New York possesses with respect to legislative "intent"; that intent is, of course, not ascertained by examining each legislator but by looking to extrinsic circumstances such as the coverage of the statute and its legislative history. Cf. *id.* at 459, 469 (FRANKFURTER, J., concurring).

In short, then, we believe that appellants' only possible *prima facie* case—even assuming arguendo that their complaint invoked some colorable constitutional right—was to show that the district was so drawn that it deliberately excluded Negro and Puerto Rican voters wherever possible. On this record, they have failed utterly to carry that burden.

C. Appellees showed that the boundaries of the 17th district are a logical outgrowth of prior redistrictings whose validity is not attacked by appellants' proof.

Of course, even if appellants presented enough evidence to require rebuttal, they would still bear the ultimate bur-

den of persuading the trier of fact that there was no "reasonable basis" other than race and national origin for the redistricting. *McGowan v. Maryland*, 366 U. S. 420, 426 (1961); *Morey v. Doud*, 354 U. S. 457, 464 (1957). It would be possible, for example, to find that even a pattern of concentration which is so rigid as to suggest a conscious manipulation of the lines may turn out, after the state presents its evidence, to have been produced by totally different considerations.

Even assuming that appellants here showed a pattern so striking that the trier of fact could infer that there had been this kind of manipulation, we believe that the series of maps introduced by appellees, showing the evolution of the present 17th district from past districting statutes, would have rebutted this inference. As we pointed out in our review of the evidence, the new 17th district has retained the same general lines as its predecessor districts created in 1941 (Def. Exh. F, R. 131, 239) and 1951 (Def. Exh. G, R. 131, 241), with the exception of changes necessary to expand its area when some other districts were eliminated because of population shifts. The changes from 1951 to 1961 involved only the dropping of the two-block hospital area (R. 90-92) and the expansion of the district to take in Stuyvesant Town on the south and a large area on the East Side (R. 76-77). In general, existing territorial alignments were preserved wherever possible in the 1961 redistricting (Def. Exhs. G, H, R. 131, 241-43).

Thus, it is inferable from the legislative history of Chapter 980 that it is the result of one of the most common of legislative judgments in drawing district lines—to preserve existing alignments as much as possible. Over the years, both a representative and his constituents will develop close ties with each other, and it may well be desirable for that reason to keep the constituency intact. Hearings, Standards for Congressional Districts, H. R. Comm. in the Judiciary, Sub-Comm. No. 2, 86th Cong. 1st

Sess., p. 26 (Serial No. 10, June 24 and Aug. 10, 1959). Moreover, local political associations may tend to center about the Congressional district, and too frequent shifts in district lines may cause an undesirable degree of local instability. In recognition of these realistic considerations, it has been proposed in England that existing lines should be preserved even at some cost in equality of population. See *Baker v. Carr*, 369 U. S. 186, 266, 306-07 (1962) (FRANKFURTER, J., dissenting).

The previous districting Acts are, of course, entitled to the same presumption of constitutionality as any existing statute. If appellants, in order to overcome the force of history, desired to show that these past districtings were motivated by racial considerations, they were free to do so. Cf. *Taylor v. Board of Education*, 299 F. 2d 36, 38 (2d Cir.), cert. denied, 368 U. S. 940 (1961). In fact, as we have pointed out, they charged in their complaint that this motivation "has existed for many years" (R. 6) and that the Legislature, in each redistricting, redrew the lines "in accordance with shifts in non-white population and population of Puerto Rican origin" (R. 7). Later, however, they "did not find it necessary" to prove these allegations (Br., p. 27). Now, appellants attack Judge FEINBERG's opinion below because he "assumes the constitutionality of the 1951 statute" even though "there is no evidence of the racial and group composition of the districts established by that statute at the time it was enacted" (Br., pp. 35-36). Despite this contention, they surely cannot profit by having kept the record barren of any challenge to the previous districting Acts. The burden was upon them, not the State, to show the lack of basis for the districting—and they did not meet that burden at all.

POINT II

Appellants failed to state a claim under the Fourteenth or Fifteenth Amendments.

In the previous section of our brief, we assumed arguendo that appellants stated a colorable claim under the Constitution, and we argued that they did not present evidence sufficient to support that claim. In this section, we put aside that assumption and take issue with appellants' contention that a state legislature violates the Constitution by deliberately concentrating a racially homogeneous neighborhood in one Congressional district instead of dividing it among several districts.

A. The Constitution does not prevent the Legislature from considering the racial composition of a neighborhood when it is drawing Congressional district lines.

Before we discuss appellants' theory that the Constitution forbids all classifications based on race or national origin, we must take issue with appellants' implicit assumption that it is possible for the Legislature to avoid deciding whether to concentrate a racially homogeneous neighborhood—such as Harlem, on the one hand, or the East Side, on the other—in one Congressional district or whether to divide it among several districts.

We do not believe that a Legislature can avoid this decision. Whatever district lines it chooses will either concentrate or divide the neighborhood. Whether it redistricts the area or simply does nothing and accepts the status quo, it has for better or worse made a distinct choice. *Cf. Miller v. Schoene*, 276 U. S. 272, 279-80 (1928). And, of course, it is alien to constitutional doctrine to inquire whether the Legislature or its members had actual knowledge of the racial composition of any given neighborhood or district. Under our system of judicial review, it

is assumed that all relevant facts are before the Legislature; the only question for the Courts is the legislative power to act upon those facts. *United States v. Des Moines Ry.*, 142 U. S. 510, 544 (1892).

To be sure, there is a distinction between a Legislature which simply districts an area which has wide ethnic disparities, knowing of these disparities, and one which displays a paranoid tendency to hunt out every small cluster of voters belonging to a particular ethnic group in order to single them out for special treatment. We think, for example, that appellants go too far when they define "intent" simply by stating that Legislatures intend "the natural consequence of their acts" (Br., p. 32).^{*} There are varying degrees of purpose with which a Legislature may address itself to a task, and it may even be possible to determine which of several purposes was "primary" and which was "secondary".

But the fact remains that the Legislature must make some kind of decision in districting. There can be no racially "neutral" Congressional district, and the effects of a given combination of district lines will be the same whether the legislative decision underlying the lines is based upon indifference or upon a well-developed, coherent plan. The situation is reminiscent of the familiar context of school districting where, as here, public officials must make a choice—one way or another—as to how a neighborhood is to be divided. In the school districting cases, it has been argued with much force that the State "cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted." *Branche v.*

^{*} If "intent" were thus defined—and if the Court accepted appellants' position that any classification based on race must be constitutionally tainted—it would follow that there could be no constitutional redistricting of Manhattan, since every such districting would manifest an "intent" to either concentrate or divide neighborhoods such as Harlem.

Board of Education, 204 F. Supp. 150, 153 (E.D.N.Y. 1962). If it is arguable, as in *Branche*, that the distinction between "accepting" the result of a districting and "planning" it is too thin a hair on which to save state action from the taint of unconstitutionality, it surely is absurd to use the same distinction to strike down a state statute because the Legislature "considered" the effects of race instead of merely "accepting" it. The plain fact is that the Legislature not only may "consider" the effects of race but that it cannot possibly avoid doing so.

B. The Constitution does not forbid the states from classifying persons by race in order to achieve a legitimate purpose.

If a Legislature may "consider" race, may it also go further and deliberately single out members of a particular race or other ethnic group for special treatment? Here again, we think the answer must be "yes".

The fate of the very principle of *Brown v. Board of Education*, 347 U. S. 483 (1954), hangs upon the answer to this question. For example, the Commissioner of Education of New York State has issued a sweeping order requiring local school boards to integrate school districts which reflect, albeit accidentally, a marked imbalance in racial composition. N. Y. Times, June 19, 1963, p. 1 col. 6. Soon after, the New York City Board of Education announced that it would allow Negro and Puerto Rican children to transfer from neighborhood schools with racial imbalances to other schools in the city. N. Y. Times, Aug. 26, 1963, p. 1 col. 1. If the Courts were to adopt appellants' position that a state never may use race as a basis for classification, the pupil transfer program would have to be upset—and the state would be powerless to end de facto segregation.

It is one thing to mandate a state to treat all men fairly, no matter what their color, creed or country of origin. It

is quite another matter to prevent the state from acknowledging that there are problems in the area of race relations which demand an attitude of action rather than neutrality. Cf. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U. S. 714 (1963): The latter position unjustifiably tortures decisions furthering progress into strait-jackets preventing enlightened state action.

- C. The Legislature, consistent with the Constitution, may decide to concentrate a racially homogeneous neighborhood in one Congressional district instead of dividing it among several districts.**

We now have established, first, that a Legislature may "consider" race in drawing Congressional district lines and, second, that there is no *per se* prohibition against classifications by race. We now turn to the ultimate question—may a Legislature decide to concentrate a racially homogeneous neighborhood in one Congressional district?

The problem here is somewhat different from that which is raised by the actions of school boards combatting de facto segregation. In the school cases, "the central constitutional fact is the inadequacy of segregated education," *Branche v. Board of Education*, 204 F. Supp. 150, 153 (E.D.N.Y., 1962), so that there is in those cases but one direction—integration—in which the state is permitted to move. In the case of Congressional districts, there is no single permissible route; rather, it is a matter of judgment in the particular case whether the minority will be advantaged most by concentrating its strength in one district or by dispersing its forces among several districts.

But this is a decision which must be made—for any districting statute in an area containing two or more racially homogeneous neighborhoods must either concentrate or dilute the minority's vote. A rule against concentration

would in effect be a mandate to disperse the minority among several districts. For better or worse, the choice cannot be foreclosed.

Indeed, in light of the purposes of the single-member district system, it would be anomalous to prohibit the Legislature from using race as a criterion for Congressional districting. The obvious aim of the single-member district is to secure representation to a number of citizens who form a majority of a single district but a minority of the entire multi-district unit. Thus, it guarantees that minority interests will have a voice in the Legislature. See Hearings, H. R. Comm. on the Judiciary Sub-Comm. No. 3, 87th Cong. 1st Sess., pp. 127, 129 (Serial No. 9, Aug. 24 and Aug. 30, 1961); Hacker, *Congressional Districting* 43 (1963); Bickel, *The Durability of Colegrove v. Green*, 72 Yale L. J. 39, 43 (1962).

It needs no elaboration that race relations is one of the burning issues of our times. Nor does it require exposition that minority groups, such as Negroes and Puerto Ricans, share very legitimate common concerns which they would wish to urge upon the Congress. To concentrate them in one district, where they may make their power felt, is simply a logical facet of our representative system. To require that they be dispersed over several districts—the only other logical alternative—is at best dubious policy and certainly raises many more constitutional problems than it purports to solve.

D. This case involves no abridgment of Fifteenth Amendment rights.

We believe that the above analysis is applicable to appellants' claims under both the Fourteenth and Fifteenth Amendments.

As appellants themselves point out (Br., p. 37), there are no important distinctions between the guarantees of

these two provisions of the Constitution with respect to the case at bar. Compare *Nixon v. Herndon*, 273 U. S. 536 (1927), with *Smith v. Allwright*, 321 U. S. 649 (1944). Thus, if a state arbitrarily removed the right of a Jew or a Catholic to vote in municipal elections, cf. *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), there would be a violation of the Fourteenth Amendment. See *Baker v. Carr*, 369 U. S. 186, 266, 300 (1962) (FRANKFURTER, J., dissenting). On the other hand, the removal of a voter from his municipal franchise because of his race would be a clear violation of both provisions of the Constitution. Note, 72 Yale L. J. 1041, 1055 (1963).

Despite their equation of the Fourteenth and Fifteenth Amendments, appellants do suggest at one point that there is a special windfall inherent in the latter provision. They seem to contend that there has been a violation of the Fifteenth Amendment because the 18th district, predominantly Negro and Puerto Rican, has "less voting power," i.e., greater population, than the predominantly white 17th district (Br., p. 38). Obviously, there is no merit in this suggestion. As we have pointed out, all the Congressional districts in New York County are well within the range of substantial population equality. The Fifteenth Amendment certainly does not require that districts containing racial minorities be treated differently from any other districts. Moreover, the 18th district has the second smallest population of the four districts in New York County, and it is inconceivable that there could be any charge of racial bias resulting from the population figures.

We believe, therefore, that appellants have not raised a claim with respect to either the Fourteenth or Fifteenth Amendments. These provisions are a guarantee of voting equality, but they do not and cannot immunize a neighborhood containing a racial minority from the normal vicissitudes of districting.

POINT III

The complaint fails to raise a justiciable issue.

Appellants, relying principally on *Baker v. Carr*, 369 U. S. 186 (1962), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), have sought to clear the hurdle of justiciability by phrasing their complaint in terms of Fourteenth and Fifteenth Amendment prohibitions against racial discrimination. Their attempt, however, falls far short of the mark. Two crucial elements in this case make it clear that it is not amenable to judicial determination. First, there is a total absence of judicially manageable standards for determining whether New York must divide a racially homogeneous neighborhood among two or more Congressional districts. Second, as a consequence of the lack of such standards, the Constitution clearly commits this issue to a coordinate federal branch, the Congress. See *Baker v. Carr*, *supra*, 369 U. S. 186; 210, 217, 226 (1962).

The issue here, as we shall show, contrasts vividly with the claims held justiciable in both the *Baker* and *Gomillion* cases. In fact, this Court found the claim in *Baker* justiciable precisely because the issues it raised did not require the Court to make the kind of policy determination reserved for the Congress. In the opinion, Mr. Justice BRENNAN noted (369 U. S. at 226):

"We have no question decided, or to be decided, by a political branch of government co-equal with this Court. . . . Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking."

- A. There is no discoverable constitutional standard by which this Court, in reviewing Congressional districting statutes, may choose between the alternative policies of concentrating or dividing racially homogeneous neighborhoods.**

Appellants ask this Court to make a sweeping policy determination for which there is a total lack of criteria appropriate for judicial consideration. Any statutory classification based upon race or place of origin is, they contend, necessarily unconstitutional (Br., p. 18). In effect, they argue that a Congressional districting statute may not reflect existing patterns of ethnic concentrations, even in relatively compact neighborhoods.

Although appellants maintain that the State can draw racially "neutral" (Br., p. 31) district lines in an area such as Manhattan, we believe that this contention is untenable. Any lines that are drawn necessarily concentrate the voters of a neighborhood in a single district or disperse them among two or more districts.* A neighborhood made up of persons of one or two minority groups—such as Harlem, the neighborhood embraced in the 18th Congressional district—is no exception. No matter what kind of so-called "objective" criteria the Legislature employed—plaintiffs suggest only the use of full census tracts and of major streets—there would still remain for the legislative choice an almost infinite variety of possible boundaries, each of which would create districts having differing ethnic makeups. And, as we have observed, the individual legislator could hardly be expected to be ignorant of the racial composition of the areas

* The notion that "neutrality" would eliminate the claimed evil of districts having an overwhelming concentration of members of a single race was refuted by appellants' own proof. One of the supposedly "neutral" districts which they envisioned (Pl. Exh. 6B, R. 89-90, 213), showed an absence of Negro and Puerto Rican influence which differed little from the condition existing in the 17th district under the present districting.

encompassed in each district. This is particularly true of an area such as Manhattan, where neighborhoods like Harlem and the East Side present such contrasts of race and other characteristics. In short, the standard of "neutrality" is not a touchstone; it is, rather, a hopeless myth.

The crux of the problem is that, in districting, it is possible neither to say that race is irrelevant nor to locate a clear or fixed desideratum for the use of racial standards. Thus, the instant case raises issues of justiciability which are absent from the many areas in which classifications by race previously have been scrutinized by the Courts.

In the bulk of the cases in which racial classifications have been struck down, the use of race as a criterion was utterly unreasonable. Obviously, there can be no warrant for using a man's color to determine whether he shall be qualified for jury service, *Eubanks v. Louisiana*, 356 U. S. 584 (1958), or whether he shall be allowed to vote in a given municipality, *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), or a given election, *Nixon v. Herndon*, 273 U. S. 536 (1927), or whether he shall be allowed to purchase the home of his choice, *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681 (N. D. Ill., 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir., 1961), or whether he shall be allowed to sit in a seat of his choice at a public facility, *Johnson v. Virginia*, 373 U. S. 61 (1963). In each of these cases, race was a plainly irrelevant criterion—it was both unnecessary and improper for the State to give any consideration to the race of the individual upon whom it exerted its power.

In still another class of cases, the Courts may review the use of racial criteria, even though their use is not per se prohibited, because there is a fixed desideratum against which a particular case may be measured. We have indicated our belief that the school segregation cases are of this type. In any context in which neighborhoods must be

placed in a given district—whether it be a school district or a Congressional district—we believe it is no part of wisdom or reality to insist that districting can only be done by public officials who live in blissful ignorance of the ethnic composition of the neighborhoods they serve. Each of the many possible ways in which the neighborhood may be related to the district has different consequences for the racial balance of the school or the voting unit, and a wise public official cannot shut his eyes to them.

In the case of the school district, it is arguable that he is obliged by the Constitution to arrange the lines so as to assure diffusion of the races throughout the district. This is so because segregated education deprives the minority group of equal educational opportunities. *Branche v. Board of Education*, 204 F. Supp. 150 (E.D.N.Y., 1962). Cf. *Brown v. Board of Education*, 347 U. S. 483, 493 (1954). In any event, even if the Constitution does not require that public officials change existing lines to promote integration of schools, it at least provides a clear guide by which to gauge their conduct when they do redistrict—they must avoid segregation and promote integration.

In the case of the Congressional district, there is no such discernible standard. If a minority group concentrated in one neighborhood is to have a decisive voice in the election of a Congressman, it may be desirable to include the entire neighborhood in one district so as to make the most of the minority's voting power. On the other hand, it may be that the minority could benefit most if a neighborhood were divided among several districts so that it could exert an important and perhaps controlling influence in each. And to complicate matters all the more, any proposed district lines which concentrate the minority in one district simultaneously lessen its power in the adjoining districts; likewise, a districting which diffuses the minority's power lessens its influence in the district in

which it ordinarily predominates. Only a judgment rooted in practical politics can determine which course is most conducive to the minority's position. Over and above that is the deeper and perhaps unanswerable question as to the proper balance of representation between the minority group and its neighbors.

Mathematics, too, adds to the list of imponderables here. A holding that concentration is constitutionally forbidden would put the Courts in the position of having to decide what is a sufficiently integrated district. If 5.1% integration (as in the present 17th district) is not constitutionally sufficient, what is the proper measure? Plaintiffs' Exhibits 6A (R. 211, 88-90) and 6C (R. 215, 88-90) suggest that lines could be drawn through Harlem so as to make it possible for white non-Puerto Rican voters to control all four of Manhattan's districts. Dilution of a Negro and Puerto Rican vote would thus be achieved, but appellants' conclusion that Negroes and Puerto Ricans would have the pivotal votes in all four of such districts (Br., p. 19) does not necessarily follow—they could easily become the forgotten voters of each district. In any event, the political effect of such a districting is certainly open to conjecture. So, too, are the social and psychological effects—there is no more reason to think the effects will be beneficial for society in general, or for Negroes and Puerto Ricans in particular, if the districting dilutes their vote than if it concentrates it. The sure guide to the conscience of public officials and the standards of judicial review which is present in the case of school districting is completely absent in the case of Congressional districting.

This is not to say, however, that the use of racial criteria in districting statutes can never be subject to judicial review. Where there is an unequivocal with-

* Appellants appear to suggest (Br., p. 9, R. 86-87) that 8.5 per cent integration of Manhattan's 17th district would have been constitutionally sufficient.

drawal of the vote and hence of the advantages the ballot affords, solely on the basis of the affected citizens' race, the Fifteenth Amendment's clear prohibition against such state action is obviously an applicable criterion. *Gomillion v. Lightfoot*, 364 U. S. 339, 346-47 (1961). In such a situation, it matters little whether the right to vote is taken away by an outright statutory prohibition or a more subtle *Gomillion*-type gerrymander. Either is amenable to judicial scrutiny. Similarly, if there were in any state a discernible pattern of concentrating minority groups in Congressional or legislative districts having populations significantly greater than the average district, cf. *Baker v. Carr*, 369 U. S. 186 (1962), this would seem to make out a prima facie case of abridgment of the right to vote under both the Fifteenth Amendment and the equal protection clause. In each of these instances, there are adequate judicial standards for gauging the issue presented.

In the instant case, however, there is no touchstone. There are no significant population inequalities in the New York districts, there is no withdrawal of the right to vote in a Congressional election, and there was a clear necessity for the Legislature's re-drawing of the lines in 1961. There simply is no way for a Court to measure the relative merits of a districting statute which tends to concentrate minorities in one district as against one which tends to disperse them among several districts. This is the heart of the "political thicket", cf. *Colegrove v. Green*, 328 U. S. 549, 556 (1946) (opinion of FRANKFURTER, J.), where conflicting theories of representation in a democracy become entwined with the competing interests of minority groups and the forces of partisan politics.

It is the legislative struggle, not the judicial process, that must produce a determination, conscious or unconscious, that in a particular situation one or more groups' influence should be reflected in a districting statute. It is a kind of determination which is peculiarly one of feeling; of gauging the temper of the people, the needs of the

times, and the practicalities of elective office. It is a determination which is an ever-present part of the politics of the people and one which is as alien to the judiciary as is the management of the budget or the selection of public officers.

B. The right of minorities to fair representation in the House of Representatives is adequately protected by Congressional review of state districting legislation.

We have suggested that the distribution of racially homogeneous adjoining neighborhoods among Congressional districts is a matter of policy-making appropriate to legislative, not judicial, resolution. This is not to say, however, that state legislatures have total license in this area to follow districting policies which stray from the course of statesmanship and disregard the purposes of the single-member district system. There is a federal review—but it lies with the Congress.

Much as judicial review of state action is appropriate where there are judicially ascertainable and manageable standards, so, too, the Constitution provides for an analogous Congressional review of state action which lies in the realm of political choice. In the case of Congressional districting, the Congress is specifically provided by the Constitution with the power to impose a federal standard to curb abuses by state legislatures of their districting powers.

Article I § 4 provides that

“The Times, Places and Manner of holding elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations . . .”

Article I § 5 provides that

“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, . . .”

It would seem that, pursuant to these provisions, there are two principal methods by which the Congress could

guard against excesses in districting by state legislatures. First, Congress could enact general standards; for example, it could require that representatives be elected from districts which are compact, contiguous and of substantially equal population. Second, Congress could exercise the power, inherent in Article I § 5, of refusing to seat an individual elected from a district which did not conform to appropriate standards. These two procedures obviously are tied closely to each other. For example, while the Congress might enact some standards which, once the initial policy were established, would be appropriate for judicial as well as Congressional consideration, other standards would remain suitable for enforcement only by the Congress itself, under Article I § 5. Similarly, while formalized standards might be a guide to Congress in exercising its powers under Article I § 5, it surely would be possible for a House to determine on an ad hoc basis simply that a state legislature had overstepped the bounds of reasonable discretion in creating a particular district.

The legislative history of Article I §§ 4 and 5 of the Constitution shows clearly that the framers contemplated that the interest of the federal government would be safeguarded by the power of Congress to exercise a federal review over state regulation of Congressional elections.

The two sections were adopted by the Philadelphia Convention* after a minimum of debate—apparently none at

* When considered on the floor of the Convention, the provisions were a part of the draft Constitution submitted by the Committee on Detail on August 6, 1787. They appeared as Article VI § 1 and Article VI § 4 of the draft, *vis*:

"Article VI—Sect. 1. The times and places and manner of holding the elections of the members of each House shall be prescribed by the legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.

* * * * *

Sect. 4. Each House shall be the judge of the elections, returns and qualifications of its own members."

2 Records of the Federal Convention of 1787 (Farrand, ed. 1911), pp. 179, 180.

all in the case of the present § 5. 2 Records of the Federal Convention of 1787 (Farrand, ed. 1911), pp. 239-42, 254. The only real debate in connection with adoption of the provisions was on a motion to strike the provision that the laws and regulations of the state governments could at any time be altered by the legislature of the United States. James Madison and Rufus King argued vigorously against the motion and in favor of giving a controlling power to the national legislature. *Id.*, 240-42. The motion to strike the provision failed. Following the adoption of a change of verbiage—meant, according to Madison, “to give the national legislature a power not only to alter the provisions of the states, but to make regulations, in case the states should fail or refuse altogether”—the present Article I § 4 was adopted in substantially its final form.* *Id.*, 242.

The debates in the various state ratification conventions reveal a definite assumption, on the part of both the opponents and the defenders of the new Constitution, that Article I §§ 4 and 5 had the effect of lodging ultimate control over the conduct of Congressional elections in the Congress. Madison, for example, argued in the Virginia Convention that (3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution [Elliot ed., 2d ed. 1854], p. 367):

“Should the people of any state by any means be deprived of the right of suffrage, it was judged proper

* As amended on the floor of the convention, the provision—Article VI §1 of the draft of the Committee on Detail—read as follows:

“The times; and places, and manner, of holding the elections of the members of each House, shall be prescribed by the legislature of each State; but regulations, in each of the foregoing cases, may, at any time, be made or altered by the Legislature of the United States.”

See 2 Records of the Federal Convention of 1787 (Farrand, ed. 1911), pp. 179, 242.

that it should be remedied by the general government. It was found impossible to fix the time, place and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised . . ."

Similarly, Charles Cotesworth Pinckney contended in the South Carolina Convention that (4 *id.* at 303):

"... it is absolutely necessary that Congress should have this superintending power, lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state, and lest the same faction, through partial state views, should altogether refuse to send representatives of the people to the general government."

See also 1 *id.* 21-35, 48-51 (Debate in the Massachusetts Convention); 3 *id.* 9, 60, 175-176, 366-367 (Debate in the Virginia Convention); 4 *id.*, 50-72 (Debate in the North Carolina Convention). It is perhaps worthy of note that at least six of the states which ratified the Constitution—Massachusetts, New Hampshire, New York, Rhode Island,

South Carolina and North Carolina—did so on the understanding that an amendment restricting the power of Congress over the conduct of elections would be considered by the first Congress. 1 *id.* at 318-337. Of course, no such amendment was ever adopted.

Alexander Hamilton thus summarized the essential problem, and its resolution by the framers of the Constitution (The Federalist, No. 59):

“It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every possible change in the situation of the country; and it will therefore not be denied that a discretionary power over elections had to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.”

Congress has on a number of occasions exercised its power to establish standards for the states to follow in making laws to govern the election of representatives. In 1842 it established for the first time the requirement that representatives be elected from districts (5 Stat. 491).

Subsequent federal reapportionment acts included requirements that districts be compact, contiguous and of substantially equal population (12 Stat. 572 [1862], 17 Stat. 28 [1872], 31 Stat. 733 [1901], 37 Stat. 13, 14 [1911]). The 1929 federal reapportionment act (46 Stat. 21) omitted the requirements of compactness, contiguity and equality in population of districts, and this Court subsequently held that those requirements had thereby been abrogated. *Wood v. Broom*, 287 U. S. 1 (1932). The presently existing statute, 2 U.S.C. § 2a, does not require that representatives be elected from single-member districts but does appear to prefer that system to elections at large.

Congress has in the past also exercised its power to consider whether a particular state districting measures up to federal standards. The House of Representatives, as well as the Senate, has on several occasions entertained challenges to the seating of a member on the ground that his district did not conform to required standards. See 45 Cong. Rec. 8699-8709 (1910); Beard, *American Government and Politics* 129-35 (10th ed., 1949). Moreover, statutory provisions exist which set forth at some length the procedures to be employed in contesting an election for representative. See 2 U.S.C. §§ 201-226.

Previous decisions of this Court lend further support to the proposition that Congress has a general supervisory power over the election of representatives, including the manner in which a state is divided into Congressional districts. See *Ex parte Seibold*, 100 U. S. 371, 383, 387 (1879); *Ex parte Clarke*, 100 U. S. 399 (1879); *Ex parte Yarborough*, 110 U. S. 651, 660 (1884); *Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565, 569 (1916).

It is one thing to say that the states may not deal unfairly with minority groups in drawing Congressional district lines. But it is quite another thing to argue, as do appellants, that the Courts should determine in each instance whether a minority's interests are best served

by concentrating it in one district or dividing it among several districts. The factors comprising any such determination are neither within the competence of the Courts nor within the tradition of our judicial system. They involve judgments which can be made only by the political branches of government—and then only with great difficulty. The guardian of federal review in such a case is, and must be, the Congress and not the Courts.

POINT IV

Relief should be denied under settled principles governing the exercise of equitable discretion.

In their complaint, which was brought on the eve of the 1962 Congressional elections (R. 19), appellants sought an injunction restraining the primary and general elections for members of the House of Representatives from New York County (R. 7-8) and an order that (a) the forthcoming elections be held at large in New York County unless the State Legislature enacted a "valid redistricting" in New York County before the scheduled primary elections or, (b) in the alternative, that a special master be appointed to "redefine constitutionally" the boundaries of the districts in New York County (R. 8). Appellants also sought a judgment declaring that the "separate and distinct" portion of New York's 1961 redistricting act which describes the boundaries of the New York County Congressional districts violates the Fourteenth and Fifteenth Amendments to the Constitution (R. 7).

Since any relief requested with respect to the 1962 elections is now moot, appellants now have abandoned their prayer for injunctive relief and seek only a declaratory judgment (Br., pp. 39-40). They urge that, after this declaration, the New York Legislature will have an adequate opportunity to enact a law "validly" redistricting the four Congressional districts of Manhattan prior to the 1964 Congressional elections (Br., p. 40).

We believe that the relief sought by appellants is hopelessly vague, and that it merely highlights the impossible task which would face a court of equity in enforcing appellants' elusive theories. It is, of course, of no moment that they have abandoned at this stage their claim to injunctive relief and seek only a declaration of unconstitutionality. First, an equity court must apply some touchstone of constitutional theory when it reviews any Act which is passed to replace the one declared unconstitutional. Second, in the event that the Legislature is unable, for one reason or another, to redistrict the state in time for the 1964 Congressional elections, the Court must be prepared to grant specific relief. It is no part of equity's function to exercise jurisdiction "in the hope that such a declaration as is made today may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief." *Baker v. Carr*, 369 U. S. 186, 251, 260 (1962) (CLARK, J., concurring). Unless a declaration of unconstitutionality here could be supported by an effective decree, the only proper course would be to dismiss the complaint.

It is to this problem—the impropriety of the relief sought—that we now turn. We will discuss under this topic three factors which, in our view, make it inequitable to grant relief here. First, as we have indicated, we believe there are no standards by which the Court could implement a decree. Second, we believe that the relief sought would do more harm than good. In no event could a decree be limited to New York County; on the contrary, it would necessitate a redistricting which would involve each of New York's 41 Congressional districts and it might also entail the alarming possibility of a Court-ordered election at large of all representatives from New York. Third, we believe that there is no warrant at all for any relief directed against the Governor of the State, since he is no more involved in this action than in any other suit challenging the constitutionality of a state law, and adequate relief could be obtained against other parties.

A. There are no standards by which an equity court can fashion relief in this action.

The relief here sought would require a judicial decree which cannot be rooted in any principled standard known to our law.

An equity Court, in fashioning relief in this case, would have to decide what is a sufficiently "integrated" Congressional district. The same problems which, in our view, render this issue non-justiciable also prevent any such formulation in a decree. First, there is no way for a Court to determine the precise point at which the minority group's power is maximized, for with every increase in the degree of "integration" in the 17th district, the degree of "dilution" of the minority's power in the adjoining Congressional district—in this case the 18th district—also increases. Second—and even more fundamental—there is no way for a Court to distinguish between relief which merely secures "fair" treatment for a racial minority and relief which over-emphasizes the minority's voting power in relation to the legitimate interests of those who live in the same locality. The long and short of it is that there is simply no way for a Court to draft a workable decree in this case.

Moreover, the relief which appellants seek is drastically at odds with the theory of their own complaint. Appellants' first premise is (Br., p. 18) that all classifications based upon race are forbidden by the Fourteenth Amendment. Yet, this theory would be violated by the relief sought. For one thing, they have suggested—and apparently attempted to prove—that the "purpose" of the statute here challenged is to create a Congressional district containing a very low percentage of Negro and Puerto Rican voters. Presumably, therefore, any relief would involve an expansion of the 17th district to take in a greater number of such voters. If their first premise is adopted, however, is it not violative of the Constitution for a Court to take race into consideration in order to add a "quota" of Negroes and

Puerto Ricans to the 17th district, even in order to increase their influence there? Moreover, appellants have also argued (Br. p. 31) that "unintended as well as intended" concentration of Negro and Puerto Rican voters in the 18th district may run afoul of the Constitution. Presumably, the relief under this theory, too, would involve transferring a number of such voters to the 17th district. Here, too, the relief clashes with the first premise—that all classifications by race are forbidden: "If the fact of racial homogeneity is regarded as the constitutional evil," are not state legislatures "forced to employ racial criteria in drawing district lines so as to avoid a constitutionally impermissible, or even constitutionally suspect, grouping of members of the same race"? Does not this test make the use of factors such as race "mandatory rather than forbidden"? See Note, 72 Yale L. J. 1041, 1056 (1963). In light of the inherent contradictions in appellants' theories, it is small wonder that no decree could be drafted that would satisfy their conditions.

The lack of standards suggests that this is a classic case where equity will not intervene, and we so urge. We submit, however, that this lack of standards also has a bearing upon the validity of appellants' abstruse theories of constitutional law. If these theories cannot be embodied in a workable decree, is this not in itself cause to doubt the initial validity of appellants' constitutional arguments? The deficiencies of the claim here as a basis for equitable relief in our view are the same deficiencies that render it faulty as constitutional doctrine. It is simply alien to the notion of Congressional districting to speak of "segregating" a voter out of a district; and it is both alien to districting and a sharp departure from our tradition to demand relief which would require the Legislature to disperse an ethnic unit in order to assure the proper "mix" of the races in each district.

B. Any relief would be ineffective in securing appellants' rights, and would cause harm far outweighing its beneficial effects.

Even if there were some conceivable standard by which a court of equity could administer a decree embodying appellants' standards of constitutionality, such a decree would accomplish little for them and would be enormously harmful to the people of the State of New York. The cure would "be worse than the disease." *Colegrove v. Green*, 328 U. S. 549, 564, 565 (1946) (RUTLEDGE, J., concurring).

We note first that, contrary to appellants' position, the implications of a declaration of unconstitutionality cannot be confined to New York County. First, there is absolutely no provision by Congress for an election of representatives at large from a political subdivision of a state. On the contrary, the Congress has provided that, where a state has lost representation due to population shifts but has failed to pass a valid districting measure, its representatives must be elected at large from the entire state. See 2 U.S.C. § 2a(c)(5). Second, even in the absence of this binding Congressional command, there would be no reason for a Court to assume that New York, in the face of a declaration of unconstitutionality, would continue to follow the geographic boundaries of New York County in drawing its Congressional districts. In fact, as Judge Moore pointed out in his opinion (R. 160), in past districtings of the County, adherence to county lines has been the exception rather than the rule.* In any event, since much of the racial "imbalance" in the districts is due to the concentration of Negroes and Puerto Ricans in one portion

* Even in the current statute, New York Laws of 1961, ch. 980, it is not unusual for a Congressional district to combine parts of two counties. For example, the 2nd Congressional district combines parts of Nassau and Suffolk Counties; the 10th, parts of Kings and Queens Counties; and the 16th, part of Kings with all of Richmond.

of Manhattan Island, it is doubtful whether any districting confined to Manhattan possibly could avoid the charge that it either concentrated or diluted the votes of these minority groups. The result of a declaration of invalidity, if no suitable redistricting plan were offered—and it is difficult to glean a standard for such a plan—would be an election at large of all 41 members of the House of Representatives elected from New York State.

We need not labor the implications of a forced election at large. In the winner-take-all grab bag which results, all minorities—whether they be racial or political minorities—are deprived of any voice in government. It is the exact antithesis “of representation by districts which the prevailing policy of Congress commands”. *Colegrove v. Green*, 328 U. S. 549, 564, 566 (1946) (RUTLEDGE, J., concurring). It “fails to fulfill the traditional principle of Congressional representation according to districts”. Statement of Mr. Justice (then Deputy Attorney General) WHITE, Hearings, H. R. Comm. on the Judiciary, Sub-Comm. No. 3, 87th Cong. 1st Sess., p. 122 (serial no. 9, Aug. 24 and Aug. 30, 1961). See 2 U.S.C. § 2a.

Despite the extraordinary and utterly unfortunate effect of an election at large or, for that matter, of a forced redistricting, appellants ask, in effect, that a declaration of unconstitutionality issue merely upon proof that there is a marked disparity in racial composition between the constituencies of two adjoining Congressional districts, the 17th and 18th districts. The defendants-intervenors, in their brief in this Court, have characterized this as a “narrow polarized view,” and we agree. There is absent any reference whatsoever to any other areas in the state with a similar grievance, real or imagined. Even if there were any fault to be found with the 17th district, a decree surely would effect a cure “worse than the disease.” *Colegrove v. Green*, 328 U. S. 549, 564, 565 (1946) (RUTLEDGE, J., concurring).

Perhaps the most striking feature of the call for the intervention of equity power here is that appellants themselves would not be helped and would doubtless be harmed by the relief here sought. An election at large would diminish and perhaps altogether eliminate the influence of the Negro and Puerto Rican voters of New York County. Neither they, nor anyone espousing their cause, could conceivably have anything to gain from the grant of relief in this case.

C. No relief should issue against the Governor of the State of New York.

It is not clear why the Governor of the State has been joined as a defendant in this action. Whatever exotic reason may have prompted this, it seems obvious that no relief should issue against him. He is no more connected with this action than he is with any of the other myriad suits which are brought to test the validity of state statutes in both the state and federal courts. In fact, appellants alleged only that the Governor "is under a duty to administer and enforce the State statute which is the subject of complaint herein" (R. 2). This is, of course, true of the Governor's role with respect to every state statute in every state of the Union. It is likewise true of the role of the President of the United States with respect to every statute enacted by the Congress. The Governor, like the President, has a continuing obligation to take care that the laws be faithfully executed. Compare N. Y. State Const. Art. IV § 3, with U. S. Const. Art. II § 3. Cf. *Phillips v. United States*, 312 U. S. 246, 251-52 (1941). If relief is to issue against them, it must be because that obligation makes them proper parties in every constitutional litigation.

Significantly, throughout the long history of such litigation in this Court, there is no instance of relief having been afforded against a chief executive on the basis of

so tenuous a connection to the subject matter of an action. In fact, this Court has held unequivocally that the President may not be enjoined from enforcing an act of Congress on the ground that the act is unconstitutional. *Mississippi v. Johnson*, 71 U. S. (4 Wall.) 475, 500. (1866). There is no reason why the same position does not apply with respect to the Governor of the State. *Morgan v. Sylvester*, 125 F. Supp. 380, 387 (S.D.N.Y. 1954), *aff'd*, 220 F. 2d 758 (2d Cir.) *cert. denied*, 350 U. S. 867 (1955).

This doctrine frees the chief executive of harassment from suits in the normal case without in any way impinging upon a litigant's right to ultimate relief. *Cf. Matter of Nichols*, 57 How. Prac. 395, 415, 6 Abb. N. C. 474, 495 (N. Y. Sup. Ct. 1879). This is true even where a direct order of the chief executive is challenged. For example, when President Truman ordered seizure of the steel mills in 1952, the owners of the mills were able to secure the return of their property by bringing an action against the Cabinet official responsible for executing the President's order. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

It may be that in a special case the Governor of a state involves himself so personally in an action that relief must issue against him in order to secure the ultimate rights of the litigants. The instant case, on the other hand, is distinguished only by its ordinariness in this respect, and we see no warrant for any relief against the Governor of the State of New York.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of New York dismissing the complaint should be affirmed.

**Dated: New York, New York
October 8, 1963**

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES,
DARWIN BOLDEN, BENNY CARTEGENA,
RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA
SELBY, WALSH McDERMOTT, SETH DUBIN,
all individually and on behalf of all other persons
similarly situated, *Plaintiffs-Appellants,*

—against—

NELSON A. ROCKEFELLER, Governor of the State
of New York, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York, JOHN P.
LOMENZO, Secretary of State of the State of New
York, and DENIS J. MAHON, JAMES M. POWER,
JOHN R. CREWS and THOMAS MALLEE, Com-
missioners of Elections constituting the Board of Elec-
tions of the City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES,
LLOYD E. DICKENS, HULAN E. JACK, MARK
SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellées.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS

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IN THE
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YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN
BOLDEN, BENNY CARTEGENA, RAMON DIAZ, JOSEPH R.
ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH
DUBIN, all individually and on behalf of all other persons
similarly situated,

Plaintiffs-Appellants,

—against—

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York, LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, JOHN P. LOMENZO, Secretary of
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JAMES M. POWER, JOHN R. CREWS and THOMAS MAL-
LEE, Commissioners of Elections constituting the Board
of Elections of the City of New York,

Defendants-Appellees,

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E.
DICKENS, HULAN E. JACK, MARK SOUTHALL and AN-
TONIO MENDEZ,

Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

Many of the arguments contained in the Briefs for the
Appellees Rockefeller, Lefkowitz and Lomenzo ("State
Br.")*, and the Intervenor-Defendants ("Intervenor Br.")
were made by the State in its Motion to Dismiss or Affirm

*Page references in this Reply Brief not otherwise identified refer
to the State Brief.

("Motion to Dismiss").* Appellants therefore respectfully refer the Court, for the detailed refutations of these old arguments, to their brief opposing the Motion to Dismiss, as well as to their other papers filed herein.

However, after asserting in the Motion to Dismiss that the decision below was "a purely factual determination" (p. 8), the State now presents this case as one in which the Court *must* decide (a) that, despite the overruling of *Plessy v. Ferguson*, 163 U. S. 537 (1896), the Constitution still permits state legislatures to enact statutes which have the purpose and effect of segregation, and (b) that, except in situations which are not entirely clear from the State's Brief, the courts are barred from even entertaining suits challenging such segregation when it occurs as part of the process of creating governmental entities like Congressional districts. Further, after both the State (Motion to Dismiss 13-14) and the Intervenor (Intervenor Br. 14-15)-contended that Appellants could not indicate a reason why the Legislature might have desired to gerrymander racially as part of the process of creating separate Congressional Districts,** the State now postulates existence of a desire, and a right, to gerrymander racially to effectuate a form of "separate-but-better-off" theory. Finally, the State, though arguing that the Court must uphold these justifications of racial gerrymandering, attempts to rewrite the record below and to argue that this case does not involve such gerrymandering.

This reply attempts to discuss these novel propositions and several others asserted in the State Brief, and to place

*The Intervenor-Defendants did not oppose review by this Court.

**The Intervenor's make this contention despite the assertions in their intervening answer "[t]hat 99% of all Negroes and Puerto Ricans holding office [presumably in the Borough of Manhattan] are elected from the Eighteenth Congressional District . . . [and t]hat Negroes and Puerto Ricans now control at least one Congressional District . . ." (R. 17)

in perspective the facts and issues actually presented for decision in this case.

THE CONSTITUTIONAL QUESTION PRESENTED AND THE STANDARDS FOR DECIDING IT

Appellants contend (Appellants' Br. 18-21, 30-33) that this case, although slightly different in its factual pattern, follows in the mainstream of segregation cases which this Court has been called upon to decide and must be resolved in Appellants' favor under the principles derived in these cases from the 14th Amendment's "equal protection" requirement.

The basic principle, simply stated, is that a state legislature may not, without violating the 14th Amendment, engage in state action which has the purpose and effect of racially segregating individuals into separate entities—be they schools, sides of a courtroom or Congressional Districts. In the District Court in this case two of the three judges agreed with this principle (R. 165, 171). Further, as long ago as *Buchanan v. Warley*, 245 U. S. 60 (1917), this Court rejected the notion that supposed benefit to the group being segregated could justify purposeful segregation. Moreover, at least one lower court has held that even where the effect is *integration*, the use of state machinery to enforce a plan which utilizes race as a criterion is equally unconstitutional. *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681 (N. D. Ill. 1960), *reversed on other grounds*, 286 F. 2d 222 (7th Cir. 1961). Finally, this Court has never accepted the argument, which the State's Brief presents, that the courts should declare non-justiciable an entire class of cases in which Negroes could prove racial segregation, since the 14th Amendment, "while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination

against them [citations omitted]." *Nixon v. Herndon*, 273 U. S. 536, 541 (1927).

In the face of this line of precedent the State contends, without citing authority, that it may, consistent with the 14th and 15th Amendments, deliberately "classify people by race" (State Br. 20, 37, 38), and "decide to concentrate a racially homogeneous neighborhood in one Congressional district, instead of dividing it among several districts" (*id.* 38). Further, because

"it is a matter of judgment in the particular case whether the minority will be advantaged most by concentrating its strength in one district or by dispersing its forces among several districts" (*id.* 38),

the Courts may not, the State contends, review complaints which allege that the minority has been, in fact, severely disadvantaged by the action of the legislature in question (*id.* 41-47). The State does, to be sure, suggest that such action be permitted only in pursuance of a "legitimate purpose" (*id.* 37), but it renders this statement meaningless by contending that the courts should not entertain a claim that the particular districting has failed to fulfill the lofty purpose of aiding the complaining minority, because:

"The courts have no touchstone for deciding when a minority is better off by having its voters concentrated in one neighborhood and when it gains an advantage by being divided among several districts" (*Id.* 21).

The fundamental problem with this plea for State freedom to manipulate citizens on racial grounds, unrestrained by court scrutiny, is that it would give state legislatures throughout the country a dangerous power to destroy the protections of the 14th and 15th Amendments in an area (voting rights) essential to achievement of minority group equal status in the community. Even if one could assume

arguendo that the New York State Legislature, in enacting Chapter 980 at a two-day special session, without hearings, debate or other legislative history, deliberately drew racially gerrymandered district lines solely to *benefit* the Negroes and Puerto Ricans on Manhattan Island, one would clearly be required to strain to make even an *arguendo* assumption such as this in all other states. And, since states cannot possibly use racial classifications for the purpose of benefiting particular racial groups without thereby disadvantaging other such groups, it should be recognized that abstention would leave these groups, too, without the opportunity for court relief against denials of equal protection.

The State seems to seek support for its contention that this Court could, consistent with the 14th and 15th Amendments, leave to state legislatures the unbridled power to play racial roulette with voters by blandly asserting that it had "no reason" for jamming the vast majority of the Negroes and Puerto Ricans on Manhattan Island into a single district (p. 32).

However, at least two reasons can be suggested, neither of which appears remotely permissible under the 14th or 15th Amendments. The first is to effectuate a desire to destroy the effective voting power of these minority groups, in varying degrees, in the other three districts. Although the State Brief reiterates at various points that one of Appellants' hypotheticals contained two adjoining districts with 9.5% and 58.9% Negroes and Puerto Ricans (p. 13), it conveniently ignores the fact that this same hypothetical districting produces a third district in which the Negroes and Puerto Ricans would constitute 59.1% of the population (R. 89, 210). Thus, this hypothetical districting, from which the State for some reason feels it can draw comfort, posited the possibility that were Congressional district lines on Manhattan Island drawn without regard to race and national origin, Negroes and Puerto Ricans, constitut-

ing nearly 40% of the total population, would be the majority in districts electing two of the Island's four Congressmen (R. 89, 210).

A second possible reason for a racial gerrymander of this type might be to perpetuate in power a particular minority group leader or leadership clique and to prevent rivals of the same or another minority group from effectively reaching the electorate in separate districts. The State suggests that there is in Manhattan "a minority" and "a racially homogeneous" neighborhood (pp. 38-40), a suggestion contrary to the State's own statement that in Harlem there is both a Negro *and* a Puerto Rican community (p. 45). This suggests that the gerrymander in this case may well be designed to foreclose the Puerto Ricans from effective political power in both the 17th and 18th Districts and to ensure the continued political "control" of the larger Negro group in the 18th.

The necessary underpinning of the State's novel constitutional argument is the wholly falacious premise that the states "cannot possibly avoid" deliberate racial gerrymandering (p. 37). While it may be true that state legislatures will, to a greater or less degree, be aware of the effect upon various racial groups of particular enactments, it is quite a different thing to say that they must inevitably act so as deliberately to gerrymander on racial lines.

Moreover, Intervenor's concede that there are "reasonable" criteria or rational bases apart from race which a legislature could use in the course of redistricting (Intervenor Br. 13). The State in its Motion to Dismiss also mentioned a number of alternative criteria (p. 12). Finally, Appellants introduced proof of an additional "neutral" criterion—namely, the use of regular geometric divisions of the Island, with major streets and the borders of Central Park as dividing lines, to achieve reasonable equality in

population. In light of all of these suggestions as to non-racial criteria which could be utilized, it is incredible at this stage for the State to argue that the use of racial criteria is inevitable.

It thus being possible for a legislature (a) very badly to disadvantage a minority group by Congressional districting which uses race as a criterion, and (b) to use criteria other than race, there is no reason for this Court to carve out of the 14th and 15th Amendments an exception which would permit purposeful segregation in this area. Rather, the statements of Mr. Justice Whittaker in *Gomillion v. Lightfoot*, 364 U. S. 329, 349 (1960) that

“fencing Negro citizens out of Division A and into Division B is an unlawful segregation of races, in violation of the Equal Protection Clause of the Fourteenth Amendment,”

and Mr. Justice Douglas in *Baker v. Carr*, 369 U. S. 186, 250 (1962) that “gerrymandering along racial lines” violates the Fourteenth Amendment, should be reaffirmed as the clearly required interpretation of the Amendment.

The State seems to suggest that if a legislature intends to confer *benefit* on a minority group by placing it in a separate district, and in fact does produce such “benefit”, this action should be defensible against Fourteenth and Fifteenth Amendment attack (pp. 37-40). This question, however, is not presented for decision in this case, because the record does not (and could not) contain any proof of benefit to raise the question. And there is no doubt that if a “benefit” justification is permitted for segregation racially purposed, proof of benefit is the State’s burden as a matter of affirmative defense; *disproof* would not be required as part of a plaintiff’s *prima facie* case, (see, further, the discussion, *infra* pp. 8-10, regarding “Standards of Proof”).

The State also attempts to argue that this case raises the question of whether state programs whose effect is *integration* may be upheld under the 14th Amendment (pp. 19-20, 37-38). As is clear by now, this is a case where the legislature's purpose and the effect of its legislating were *segregation*, and as is also clear, this Court has long ago decided that the 14th Amendment squarely bars all segregation.* There will be time enough for this Court to decide the State's hypothetical question when a case is brought here properly raising it.

STANDARDS OF PROOF

In ironic contrast with their professed solicitude for racial minorities, the State and Intervenors argue that plaintiffs attacking a racial statute face the same burden of proof as plaintiffs who challenge an economic regulation statute which is concededly free from any invidious racial distinctions. Citing only cases of the latter type, *McGowan v. Maryland*, 366 U. S. 420 (1961) (Sunday closing laws), *Morey v. Dowd*, 354 U. S. 457 (1957) (regulation of freight carriers), *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61 (1911) (regulation of gas company), both the State and the Intervenors maintain that Appellants were obliged under the standards established by these cases affirmatively to disprove every possible basis other than race for the challenged statute (see State Br. 24-25, 27, 32, 33). They both apparently recognize that, unless this heavy burden may be shifted to the Appellants, their now enfeebled attempts to show lack of racial gerrymandering must inevitably fail.

*And this case in no way resembles *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U. S. 714 (1963), cited by the State (pp. 37-38). There the issue was how far a State could go in requiring private businesses subject to its supervision to give equal treatment to all prospective employees.

As Appellants have argued (Appellants Br. 30-33), the ultimate issue, and thus the elements of a *prima facie* case and the standards of proof generally, are quite different in racial discrimination cases from the issue, elements and standards obtaining in the cases of the type cited by the State and the Intervenor. In the latter cases, the governing rule is that the states are permitted wide latitude in classifying for economic regulation purposes, so that:

"When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Lindsley v. National Carbonic Gas Co.*, *supra*, 220 U. S. at 78. (emphasis added)

Thus, as part of a *prima facie* economic regulation equal protection case, plaintiff must prove the nonexistence of "any state of facts" that could possibly justify the statute as a rational one.

However, when a statute is challenged as having a racial purpose and effect, the ultimate issue is whether or not this purpose and effect exist; for if they do, the statute is *per se* unconstitutional. As Mr. Justice Holmes stated for this Court, unanimously, in *Nixon v. Herndon*, *supra* p. 3 (another case involving the right to vote in Congressional elections):

"States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification involving the right set up in this case" (273 U. S. at 541).

Thus, the *prima facie* burden of a plaintiff in a racial case is merely to show that the statute embodies a racial classification, e.g., *Hernandez v. Texas*, 347 U. S. 475 (1954).

Defendants in a suit alleging a racial classification may, of course, attempt to show that the statute in question classifies on a basis other than race, and the appellees had that opportunity in this case, but until proof is introduced in support of such a claim, plaintiffs have no obligation to assume the burden of rebutting it. Any other rule would impose upon plaintiffs in segregation cases a hopelessly difficult burden of proof—a burden which would have the effect of sustaining the most invidious of racial classifications.

THE PROOF IN THIS CASE

As an assuming *arguendo* proposition, stated without conviction, the State says that "there is every reason to infer" that the challenged statute does not constitute a racial gerrymander (p. 24). However, this attempt to assert that the legislature "had no fixed attitude toward race" (p. 28) is hopelessly inconsistent with the argument that the legislature could not possibly have avoided racial gerrymandering, and the admission tacitly made thereby that the legislature has not, in fact, avoided such gerrymandering.

In the course of this unconvincing effort to establish that the challenged portion of the statute rests on bases other than race, the State argues repeatedly that the district lines merely "reflect" the neighborhoods of New York City (pp. 25 and 27). However, this proposition begs the question, which is: why are the boundaries drawn where they are? Any district lines will "reflect" racial compositions of neighborhoods; the issue is not, however, the reflection but the shape of the mirror.

Also question-begging is the State's assertion, presented for the first time in its brief to this Court, that the challenged statute was designed to preserve "existing territorial

alignments" (p. 33).^{*} The answer sought to be assumed is that the prior alignments were constitutionally beyond reproach; for unless those alignments themselves were free from any past history of deliberate desires to segregate racially, any perpetration of them, however innocent if considered alone, would be contaminated by the earlier segregative genesis. *Taylor v. Board of Education*, 294 F. 2d 36 (2d Cir.), *cert. denied*, 368 U. S. 940 (1961). Cf. *Eubanks v. Louisiana*, 356 U. S. 584, 588 (1958) ("local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws").

The State recognizes this argument, but attempts to contend that it was absolved of any necessity to demonstrate the constitutional character of past districtings because such districtings were entitled to a "presumption of constitutionality" (State Br. 34). This presumption operates, the State alleges, because "[t]here is no evidence in the record that casts any taint upon the previous districting Acts" (*id.* 19).

Assuming, *arguendo*, that such a presumption is available, it was destroyed in this case because, contrary to the State's assertion, the record was replete with evidence which, to use the State's phrase, "tainted" the previous districting.

^{*}The State's brief attempts to imply that the State introduced historical maps for the purpose of sustaining this proposition. However, as clearly appears from the record (R. 106, 130-31), these maps were introduced at the request of the Court, for the sole purpose of revealing when the irrational boundaries first emerged, and were not a part of the State's case. It may be of interest for the Court to note from these maps that in 1911, when the total population of Manhattan Island was 2,331,542, and the Negro population thereof was only 60,534 (13th Census of the United States, 1910), the lines dividing Manhattan's Congressional Districts were almost geometrically straight (Defts.' Exh. C, R. 233) (as in Appellant's hypotheticals, Pltfs.' Exhs. 6A, 6B, 6C, R. 208-13), while in the 1941 redistricting, when the Island's total population had dropped to 1,889,924 and the Negro population had risen to 298,365 (16th Census of the United States, 1940), the districting lines began to assume their present multi-sided character (Defts.' Exh. F, R. 239).

First, the presentation of proof sufficient to establish *prima facie* the unconstitutionality of the present districting was also sufficient to remove any presumption that may have protected the prior districting. Second, since, as the State's Brief concedes (pp. 8-9), there were only 3 points at which the new statute altered the old district lines, and since Appellants' proof attacked the new statute at more than these three points, Appellants' proof was an attack on unchanged lines established by prior Acts, and thus put into question the propriety of those Acts themselves. For example, the "staircase" borderline between the 17th and 18th Districts, unchanged from the prior Act (except for the additionally suspicious deletion from the 17th District of the "top step" area containing 44.5% non-whites and Puerto Ricans), was the subject of strong proof by Appellants regarding the manner in which census tracts were "cut" to maximize the non-whites and Puerto Ricans in the 18th District and the whites in the 17th District. (R. 52-56, 61-66).

Thus, any presumption of constitutionality the prior districting Act may have enjoyed was destroyed by Appellants' affirmative case. Had the State genuinely intended to rely on the argument that the legislature's purpose was not to gerrymander racially but to build rationally on old lines, it had the burden of re-establishing the constitutionality of those lines.*

*That Appellants alleged but did not prove that the prior districtings were unconstitutional is irrelevant both to the issue of whether Appellants' proved their case and the issue of whether the State could rebut Appellants' case on the "building-on-the-past" theory without establishing the constitutionality of the prior districtings. The real question regarding the first issue is not whether Appellants proved all they alleged, but whether what they did prove was sufficient. There is no requirement that a case be overproved, and, in fact, any holding that plaintiffs attempting to show the unconstitutionality of present Congressional districting must show a similar infirmity in all precedes-

But even if the State could, in some fashion, have re-established the constitutionality of the prior district lines, it still could not have availed itself of the argument that the purpose of the 1961 districting was to build rationally on such lines—because the 1961 districting did not, in fact, so build. The reduction in the number of districts from 6 to 4 effectively undermined existing territorial alignments, and, contrary to the State's assertion that the 17th District is "little changed" from its predecessor (p. 7), the changes in the 1961 statute had the effect of adding to that district 122,000 people (R. 216) more people than there are, for example, in Trenton, New Jersey. Moreover, these additions occurred in areas which are not anywhere explained as being either rational or inevitable changes in the old district. Rather the overwhelming reason for the changes in the boundaries of the 17th, as Appellants' proof shows, was the desire to bring about the homogeneous racial compositions of the 17th and 18th Districts.

Both the State and the Intervenors have attempted to manipulate the record to obscure the clear picture of racial gerrymandering which it presents. Although the State characterizes as "commonplace" the fact of adjoining districts with an all-white population of 95%, and an all-Negro and Puerto Rican population of 86%, respectively (p. 25), it is hard to imagine how higher percentages could be achieved in any urban area. Also, neither the State nor Intervenors anywhere attempt to explain why the 17th District is 63,000 persons smaller than the adjoining 19th.

sors would be both irrational and would impose an impossibly expensive and time-consuming burden.

The discussion in the prior section of this brief regarding allocation of burdens in a racial segregation case, and the *Taylor* and *Eubanks* cases cited in the body of this section show clearly that the State had the burden of establishing the prior districts' constitutionality in the circumstances of this case.

43,000 persons smaller than the average for the Island, and 27,000 less than the average for the State as a whole in the face of Appellants' proof that equalization with the other districts by extending the district lines in any direction would at the very least double the number of Negroes and Puerto Ricans in the 17th district (R. 77 *et seq*). Nor do they explain why the boundaries of the 17th and 18th are so obviously gerrymandered, with the other districts being only filler districts. Finally, no attempt is made to indicate why, although the population of Manhattan Island dropped, in absolute terms, from 1,960,101 in 1950 to 1,698,281 in 1960, and the number of Negroes on the Island rose from 384,482 to 426,459,* the percentage of non-whites and Puerto Ricans in the 17th District decreased from 6.6% to 5.1% (R. 216).

The State and the Intervenor attempt to overcome the force of the record facts by suggesting that certain additions could have been made to the 17th District had the legislature intended to maximize its all-white character. They refer to the area on the northern boundary of the 17th District containing 10,507 persons with less than 5% Negro and Puerto Rican. Addition of this area would still leave the 17th vastly smaller than the other districts, and much below one-fourth of the Island's population. Also, since, as the State argues, "it is assumed that all relevant facts are before the legislature." (p. 36), it may be assumed that the legislature knew of the low-cost housing project (shown by Appellants' Exhibit 3 (R. 214) to be of a type generally 73.4% non-white and Puerto Rican in occupancy) that was to be constructed in that area and of the general push southward of the Negro and Puerto Rican population. Thus, the legislature may be assumed to have recognized that this area was but a temporary buffer zone

*17th and 18th Censuses of the United States, 1950 and 1960.

which would permit the 17th and 18th districts to retain their racially homogeneous character for another 10 years.*

The State also argues (p. 28) that there are "many census tracts" on the southern boundary of the 17th which could be added to the 17th without increasing its percentage of Negro and Puerto Rican voters. However, these tracts encompass warehouses and manufacturing areas in which virtually no people reside, and they could be added to the 17th only by bisecting the 19th or otherwise vastly increasing the amount of gerrymandering in the district lines (R. 100). In sum, the State has been unable to find any areas outside of the 17th which a racially-motivated legislature would have added to it. On the contrary, the record clearly establishes that extension of the lines of the 17th Congressional district so as to make its population equal to approximately one-fourth of the total population of Manhattan Island would have substantially increased both the number and percentage of non-whites and Puerto Ricans in the district (R. 79-87).

Quite surprisingly, the State also suggests (p. 28) a number of deletions from the 17th which could increase its racial homogeneity. But all of these suggestions would have the effect not only of further reducing the population of the 17th, and adding to the population of the already under-represented adjoining districts, they would also significantly increase the amount of gerrymandering in the district lines. If the 17th were further reduced by these deletions, and the district were expanded elsewhere to make up for the reductions, the percentage of non-whites and Puerto Ricans in the district would be much greater than at

*The State attempts to remedy its failure to introduce rebuttal evidence by going outside the record to give figures which purport to break down the population of the area concerned. However, there is no evidence in the record to show that the census tracts referred to by the State in its footnote on page 10 are the tracts which are involved in the testimony to which the State refers.

the present time. In other words, to maintain this line of argument, the State must show not only deletions which could be made but also equivalent additions elsewhere to recoup the loss in population—which additions do not, at the same time, increase to an even greater extent the 17th District's non-white Puerto Rican population. As seen above, the State has failed to do this. As seen by Appellants' Exhibit 4b (R. 204), it cannot be done.

The same holds true for the straightening of the western boundary of the 17th. As the State concedes (p. 12), the straightening would reduce the population of the 17th by 19,000 persons (double that of the only addition which they suggest). This would increase the percentage of Negroes and Puerto Ricans in the district, and, if the reduction of 19,000 persons were made up elsewhere, there would be an even greater increase in the percentage of such persons.

Moreover, none of the deletions suggested by the State would significantly reduce the 17th's non-white Puerto Rican population. The small triangular area on the southeastern boundary of the 17th contains only 1,062 persons, of which only 381 are non-whites and Puerto Ricans (R. 74), and its deletion would therefore have little impact one way or the other upon the composition of the district, except to increase the irregularities of the lines. Similarly, the area between 34th and 42nd Streets and Sixth and Eighth Avenues on the Western boundary of the 17th contains only 758 persons, of which a maximum of only 265 are non-whites and Puerto Ricans (R. 71-72), and its deletion would also be insignificant. Intervenors have erroneously suggested that there is a strip along First Avenue between 14th and 19th Streets which was excluded from the 17th and contains a population 95% white. Intervenors have simply misread the evidence and the statute since no such strip has been excluded from the 17th district.

The State attempts unsuccessfully to explain the two inexplicable omissions from the 17th. The first is the area which is 44.5% non white and Puerto Rican (R. 85, 86) between 98th and 100th Streets and Fifth and Madison Avenues which was dropped from the reconstituted district, an action which the State explains on the grounds that a hospital is located there. However, there is nothing to indicate that the same hospital was not in the same place at the time of prior redistrictings, or to rebut the picture presented in Defendants' Exhibits G and H (R. 240-43) showing that the only change was to move the northern boundary of the 17th from 100th Street down to 98th. Defendants' maps show no elimination of any street or other change in the area concerned. The second is the inexplicable loop in the district lines caused by the failure to include in the 17th the area between First and Third Avenues and 14th and 19th Streets (containing 12.2% Negroes and Puerto Ricans). The State attempts to explain this omission on the ground that this area "is no more or less contiguous to the rest of the district than is Stuyvesant Town" (p. 29). However, it is clear that had this 10-block area been added to the 17th there would be no loop in the boundary of the 17th, which is what Appellants meant when they said it was more logically contiguous.

JUSTICIABILITY

The State attempts as a last resort to argue that this case is not justiciable under the Constitution. However, its justiciability is clearly established by *Gomillion v. Lightfoot*, 364 U. S. 339 (1960), and by *Baker v. Carr*, 369 U. S. 186 (1962). In *Gomillion*, a suit based on charges of racial gerrymandering, this Court held that a challenge to an Alabama Statute fixing municipal boundaries was "within conventional spheres of constitutional litigation," while

Baker and most of the cases following it have established that federal courts will adjudicate suits challenging districting statutes even in the absence of allegations of such gerrymandering.*

Although *Baker* involved state rather than Congressional Districts, this Court made clear that its holding on the question of justiciability applies *a fortiori* in a suit challenging Congressional Districts, by stating:

"Smiley, Koenig and Carroll [285 U. S. 355; 375, and 380 (1932) respectively] settled the issue in favor of justiciability of questions of Congressional redistricting." (369 U. S. at 232)

A suit involving Congressional districting requires no intrusion into the internal politics of a state, as in the case of *Baker*, but only limitations upon the State's role in prescribing the manner of electing members of the U. S. Congress, a role specifically delegated to the State by Article I, § 2 of the Constitution and by 2 U. S. C. § 2a.

Enough has been said by others which conclusively establishes the justiciability of cases involving Congressional Districts that further elaboration is not needed here. We would only refer to the argument of the United States as *amicus curiae* in No. 22, this Term, *Wesberry v. Sanders*. See also, Black, *Inequities for Districting for Congress; Baker v. Carr* and *Colegrove v. Green*, 72 YALE L. J. 13 (1962).

SEVERABILITY AND RELIEF

Defendants and Intervenors assert that the challenged portions of Chapter 980 are inseparable from the rest of

*It should be emphasized that the fact that Congress is empowered by Section 5 of the 14th Amendment to remedy racial segregation has never been held to preclude the courts from adjudicating cases attacking racial segregation.

the Statute and that if the Court were to strike down the invalid parts, it must invalidate the entire Statute.

Appellants do not contend that Chapter 980 is in its entirety invalid; they do not dispute the boundaries established for the remaining 37 districts set forth in the Statute.

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected" (*Allen v. Louisiana*, 103 U. S. 80, 83). The criterion is "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the Legislature if those provisions are stricken out" (*Allen v. Louisiana, supra*).

Judge Cardozo, speaking for the New York Court of Appeals, expressed the guiding principles thus (*People ex rel Alpha P. C. Co. v. Knapp*, 230 N. Y. 48, 60):

"In this state, we have gone far in subdividing statutes, and sustaining them so far as valid . . . The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."

The provisions of the Statute here attacked are separate and independent from its other provisions. New York County is a self-contained geographical unit; within its overall boundaries there are four Congressional districts.* A determination that those four Congressional districts within the County should be differently described would not upset any of the remaining districts throughout the State, nor affect the election of Congressmen from any of the other districts in the State. Retaining the other parts of the Statute without the invalid ones would not, therefore, "cause results not contemplated or desired by the Legislature." (*Connolly v. Union Pipe Co.*, 184 U. S. 540, 547). Except for the four representatives from New York County, the Congressional representatives from New York may be regularly chosen in primary and general elections from the districts established by the Statute, and the election of Congressmen from other Congressional districts throughout the State would not be jeopardized if the elections of the Congressmen from New York County proceed under alternative plans.

Where a statute, such as this, affects differently each portion of the State, it is beyond the bounds of reasonableness to assume an intent on the part of the Legislature that one portion of the statute, affecting one county within the state, if held invalid, will destroy the entire enactment. The legislative intent may be reached "pragmatically by the exercise of good sense and sound judgment." The remaining districts established by the Statute may serve the function intended though the four districts established in New York County are rejected. Upon a declaration of the invalidity of the boundaries of the four New York

*The State is simply in error in the assertion, in the footnote on page 6 of its brief, that a portion of the 20th District is on the northern side of the Harlem River, and thus on the mainland (R. 131, 148).

County districts, the Legislature at a Special Session could redefine those boundaries validly. But if the entire Statute were struck down, and the former statute again became operative because Chapter 980 was wholly void, there would be more districts within the State than representatives apportioned to it; and the Federal statutes would then require elections at large throughout the State. This would indeed create a chaotic condition and would cause results neither contemplated by the Legislature nor necessary to enforce Appellants' rights.

The State also attempts to argue that relief is impossible because the cure would be worse than the disease. This argument is based upon the invalid assumption that the only ultimate relief would likewise be elections at large on a state-wide basis. Even assuming the State Legislature would not on its own initiative correct any unconstitutionality declared by this Court, there are clearly alternatives to state-wide elections at large. If a special master is deemed undesirable, then elections at large could be held limited to New York County and the four Congressmen from Manhattan Island.

Although the State attempts to argue that 2 U. S. C. § 2(a)(c)(5) carries a negative implication that elections at large on a less than state-wide basis are not permitted, that statute mandates state-wide at-large elections only in the limited situation in which a state whose representation in Congress has been reduced has failed to enact a redistricting statute. Nothing in 2 U. S. C. § 2(a)(c)(5) would prevent the States from holding at-large elections, either local or state-wide, in any other situation, and the broad equity power of the Federal Courts to grant appropriate relief is surely sufficient to permit the ordering of elections at large limited to Manhattan Island. The legislature has chosen in its statute to treat Manhattan Island as a separate

entity, and a Federal Court should not be barred from doing likewise.

The suggestion of the State (p. 59) that an at-large election limited to Manhattan would possibly "diminish the influence of Negroes and Puerto Ricans in Manhattan" is patently absurd. The last two presidents of the Borough of Manhattan (elected at-large) have been Negroes, and, with nearly 40% of the population, it is inconceivable that Negroes and Puerto Ricans would have less influence in such an election than they have presently as a result of being largely concentrated in a single district, and almost completely excluded from another.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

Dated: November 11, 1963.

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No. 96

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES,
DARWIN BOLDEN, BENNY CARTAGENA,
RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA
SELBY, WALSH McDERMOTT, SETH DUBIN,
all individually and on behalf of all other persons
similary situated, *Plaintiffs-Appellants,*

—against—

NELSON A. ROCKEFELLER, Governor of the State
of New York, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York, JOHN P.
LOMENZO, Secretary of State of the State of New
York, and DENIS J. MAHON, JAMES M. POWER,
JOHN R. CREWS and THOMAS MALLEE, Com-
missioners of Election constituting the Board of Elections
of the City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES,
LLOYD E. DICKENS, HULAN E. JACK, MARK
SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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Plaintiffs-Appellants,

—against—

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Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

Appellants respectfully request that this Petition for Rehearing be granted and:

- (1) that the judgment of the Court be vacated and that the case be remanded to the three-judge court for the taking of further evidence; or, in the alternative,

(2) that a further hearing be held in this Court.

As to remand:

Relying upon *Hernandez v. Texas*, 345 U. S. 475 (1955) and the cases cited in the Jurisdictional Statement (pages 14 and 15), appellants throughout this litigation took the view, expressed in the two dissenting opinions in this Court, that they were not required to introduce specific evidence of legislative motive in order to prove their case. Now this Court has ruled that appellants' case must be dismissed for lack of proof that the legislature was "motivated by racial considerations" and that the challenged statute was "a state contrivance to segregate on the basis of race or place or origin." These elements are thus made indispensable to appellants' case.

Since the opinion of the Court has thus enunciated an entirely new standard of proof applicable in this type of case, the appropriate disposition should be remand to enable the appellants to meet this new standard rather than dismissal, c.f. *Yates v. United States*, 354 U. S. 298, 327-28 (1956). Appellants should not be barred by *res judicata* from vindicating their constitutional rights in a situation where a new standard of proof has been enunciated.

Appellants believe that on remand they could introduce evidence to meet this standard of proof by subpoenaing various documents and persons connected with the enactment of the statute.

Appellants have taken the position throughout this litigation that specific evidence of legislative motive was neither a necessary nor desirable element of proof in a segregation case. They have contended that focusing upon legislative motive would encourage legislative subterfuge and have the effect of sustaining demonstrable segregation all over the country. When asked by the three-judge court

to stipulate as to evidence of one alternative inference of legislative motive, appellants submitted a memorandum (see the original record filed with this Court, pages 516-30) asserting that such evidence was constitutionally irrelevant but requesting the court, if it deemed such evidence relevant, to make a specific ruling to that effect and to order a further hearing at which full evidence could be adduced. The court neither so ruled nor ordered a further hearing.

Now that this Court has finally ruled, in effect, that specific evidence regarding legislative motive is relevant, appellants are entitled to a full hearing on this issue.

As to rehearing by this Court:

(1) The opinion of the Court states that racial segregation was not proved because there was "evidence" in the record to support the contrary inference. Appellants find no such "evidence" whatever and believe that the Court has an obligation to indicate the nature of that "evidence." This is especially so in view of the tacit admissions by both the State and Intervenors that race was the basis of the statute. Both in its brief and argument to this Court, the principal argument of the State was that use of racial criteria could not possibly have been avoided and that use of such criteria was constitutionally permissible (see Brief for Appellees, pages 19-20 and 35-39). No clearer concession of appellants' factual contention would be possible. And Intervenors, by alleging that "Negroes and Puerto Ricans now control" the 18th district (Printed Record Page 17) candidly indicated their view as to the basis of the statute (although they later attempted to ignore this concession).

The only hint of the "evidence" referred to by the Court is its further statement that "concentration of colored and Puerto Rican voters in one area . . . made it difficult . . . to fix districts so as to have anything like an equal division

of these voters among the districts". Appellants heartily agree. But they also believe, as stated in the Jurisdictional Statement (page 11), "that the legislature could not have drawn the district lines so as to create a *more* segregated pattern." In other words, the legislature scrupulously followed racial residential patterns so as to create maximum segregation. Appellants never contended for racial *equality* in the four districts—only for legislative *neutrality* in regard to race, which the State conceded was not the case.

Perhaps the Court was referring to questions raised in oral argument regarding a partisan political alignments in the four districts. But surely partisan political factors do not explain concentration of Negroes and Puerto Ricans in the 18th District rather than the other two "Democratic" districts. And even with respect to the presently "Republican" 17th, the only "evidence" shows that partisan politics may not adequately explain the district boundaries. Appellants' memorandum to the three-judge court (see the original record filed with this Court, page 529), shows that at the time the 1961 statute was enacted, of the registered voters in the new 17th District, only 38% were enrolled as Republicans; that the registered voters added to the 17th in 1961 were only 35% enrolled Republicans; and that of the registered voters in the only area dropped from the 17th in 1961 about 57% were enrolled Republicans.

Moreover, the fact that politics, as must inevitably be the case in any districting statute, played a role in motivating the legislature is not inconsistent with the appellants' contention of segregation. Obviously, some of the legislators voted for the statute in part because they believed it would advance their political party. Indeed, appellants believe that they could show on remand that the challenged portion of the statute was the joint product of the political party in power, which desired an all-white district, and

those who deemed "control" of the other segregated district beneficial to them. Since the party in power assumed that Negro and Puerto Rican voters were overwhelmingly allied to the other party, it stood to benefit from an all-white district and also deemed its interests coincident with those who benefit from the "jamming" of Negroes and Puerto Ricans into a single district. The fact that some of those who supported the statute may thus have been motivated by a mixture of partisan political and racial considerations should not insulate the statute from constitutional challenge. An *exclusive* legislative motive to achieve segregation could rarely, if ever, be proved anywhere in the country.

The opinion of the Court would also seem to permit racial segregation whenever an inference of some other basis is "*equally*" persuasive from the record. The result will be to grant license to state legislatures in all parts of the country to engage in the most extreme forms of racial gerrymandering. All that legislatures need do is establish in the legislative history some other basis which could be deemed "*equally*" persuasive in order to render a racial gerrymander immune from constitutional challenge. Does the Court really mean to hold that partisan politics, or some other concurrent basis, can excuse racial gerrymandering of political districts? Such holding would adopt a standard equivalent to that applied in economic regulation cases and thereby apparently reverse the line of cases in which this Court has holding that, where an effect of racial segregation has been shown, an alleged motive to achieve some other objective is irrelevant, e.g. *Eubanks v. Louisiana*, 356 U. S. 584, 588 (1958)?

By failing to indicate the "evidence" which it found to support a contrary inference, the Court has deprived appellants of an opportunity to put in issue the constitutional relevance of that evidence. If the "evidence" referred to

by the Court shows that the statute was based upon partisan politics, economic status or any basis other than equality of population, appellants believe a serious question arises under the Fourteenth Amendment.

(2) The Court also states that the question of underrepresentation of congressional districts is "wholly separate" from the question of racial segregation. But appellants have consistently contended that the "17th could not be expanded in any direction so as to make it reasonably equal in population to the other districts" (Jurisdictional Statement, page 6) without undermining the effect of segregation. Of course, underrepresentation was mentioned throughout by appellants only as evidentiary of the more significant evil of racial segregation. But is also clear from the record that adherence to the "as nearly as practicable" equality test of *Wesberry v. Sanders*, No. 22, decided February 17, 1964, would go a long way toward removal of the problem of racial segregation. "As nearly as practicable" must surely mean on Manhattan Island something very close to mathematical equality in view of the absence of political subdivisions and natural geographic barriers.

(3) Even if the dichotomy between malapportionment cases and this case were conceded, the Court should nevertheless, consistent with the questions presented in this appeal, strike down the challenged portion of the statute on grounds of malapportionment. Because malapportionment was a key evidentiary element of the appellants' case, it is fairly comprehended within the questions presented. Moreover, the opinion of Judge Moore in the three-judge court discusses at length the population disparities in the four districts as compared with the state-wide average and the city-wide average, as well as statistics regarding individual districts in various parts of the state; and printed as Appendix B to the Jurisdictional Statement is the full text

of the report of the Joint Legislative Committee on Reapportionment which discusses the numerical considerations on which the apportionment statute is based.

Failure of the Court to consider the "as nearly as practicable" equality test in relation to the facts included in the record in this case would only impose a burden upon private litigants to introduce the same proof in a separate proceeding. The record in this case contains all of the statistics necessary to a finding of malapportionment in the four districts on Manhattan Island, which the statute has treated as a separate entity for Congressional districting purposes. Such a finding would furnish constitutional guidelines applicable in urban areas elsewhere in the country.

This record shows that the population difference between the largest district in Manhattan (the 19th with 445,000) and the smallest district (the 17th with 382,000) is 15.4%. Further, as indicated in Judge Moore's opinion, the 19th is 28% larger than the 24th district (with only 348,940), the smallest in New York City. In view of the absence of political subdivisions and natural geographic barriers, "as nearly as practicable" on Manhattan Island must surely mean something very close to precise mathematical equality.

The ease of applying the "as nearly as practicable" equality test in this case is demonstrated by the application in Manhattan of the test required for state senatorial districts by the state constitution (Art. 3 § 4): "that each district shall contain as nearly as may be an equal number" of citizens. The six senatorial districts in Manhattan contain citizen populations, as set forth within the districting statute itself, varying from 299,285 to 299,290, a maximum differential of only five citizens among the six districts. N. Y. State Law § 121, Twentieth through Twenty-fifth Senate Districts (McKinney's Supp. 1963).

CONCLUSION

For the foregoing reasons the judgment of the Court should be vacated and the case remanded for the taking of further evidence; or, in the alternative, appellants respectfully request a rehearing in this Court.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 58

Pursuant to Rule 58 of the Rules of this Court the undersigned, counsel in this case, hereby certifies that the within Petition for Rehearing is presented in good faith and not for the purpose of delay.

.....
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/ *Attorney for Appellants*